

4-1995

Judicial (Self-)Portraits: Judicial Discourse in the French Legal System

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Judicial (Self-)Portraits: Judicial Discourse in the French Legal System

Mitchel de S.-O.-l'E. Lasser[†]

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I am also extremely grateful for the grant support provided by the Fulbright-Hays Act, as administered by the U.S. Information Agency, the Franco-American Commission for Educational Exchange, and the Institute of International Education.

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The American judge is somehow expected to judge, really to judge.
In France, the Code is supposed to have *already* judged.¹

I. INTRODUCTION

The French legal system, according to its official pronouncements, functions on a rigid conception of the interpretive and creative role of the civil, private law judge. This conception may be thought of as an "official portrait": It is an image or representation of the judge and of the nature of the judicial role. The official portrait, whose essence is captured above by Lyotard's intriguing statement, has been the source of much confusion, especially to common lawyers. This portrait's predominance in the French legal system, and its effect on French judicial practice, has never been properly understood, even by the finest American analysis of the French legal system: John Dawson's *The Oracles of the Law*.²

By demonstrating that the official portrait is but the most visible of several conceptions of the judicial role currently operating in the French legal system, this Article seeks to correct the skewed common law accounts of how the French judicial system actually functions. In the process, this Article exposes

1. Interview with Jean-François Lyotard, council member at the Collège International de Philosophie, in New Haven, Conn. (Jan. 1992). Except where otherwise noted, all translations are by the author.

2. JOHN P. DAWSON, *THE ORACLES OF THE LAW* 263-431 (1968).

an entire sphere of French judicial discourse that is kept largely hidden from the general public, and whose very existence requires novel analysis. This Article constructs an "unofficial portrait" of the French civil judge, based on the conceptions of the judicial role prevailing in this hidden discursive sphere. Finally, it examines the effects that the coexistence of the official and unofficial portraits produce on French judicial interpretation, discourse, and rhetoric.

The official French portrait is produced by French legislative enactments, by judicial interpretations of such enactments, and by the very form of French judicial opinions. As a public portrait produced by official state institutions, it has served as the traditional focus of comparative analysis. The official portrait presents the form and structure of the judicial opinion as the very essence of the judicial enterprise. This portrait represents an interpretive ideology that posits a perfectly grammatical mode of reading:³ The French civil law system is premised on a supposedly all-encompassing and all-generating legal code. French judicial opinions merely apply the Code, which patterns their syllogistic form and mechanical structure. Implicit in this official portrait is a definition of the role of the civil judge: He mechanically (and unproblematically) fits fact situations into the matrix of the Code. Thus, "the Code is supposed to have *already* judged"—the judge is but its passive and invisible agent.

The prominence of the official portrait has masked the fact that the French civil law system also functions on the basis of other conceptions of how its judges should and do exercise their role. This Article presents the most prevalent of these alternative conceptions, and uses them to construct an unofficial portrait of the French civil judge. This portrait is unofficial because it is not the official product of state institutions; rather, it is based on mainstream French academic theory and on the hidden discourse of the French civil judiciary. It represents the French legal system's internal understanding of how its judicial system operates.

As early as the turn of the century, French jurists criticized the purely grammatical mode of reading presented in the Civil Code and in French judicial opinions.⁴ According to French academics and judges, a purely

3. The notions of grammar and grammatical reading are borrowed from Paul de Man. See PAUL DE MAN, ALLEGORIES OF READING 3–19, 54–72 (1979); PAUL DE MAN, THE RESISTANCE TO THEORY 14–20 (1986). Grammatical reading, which de Man associates with "formalism," aspires to an unproblematic and "impersonally precise" "decoding of a text" based on "a model . . . applicable to the generation of all texts." DE MAN, THE RESISTANCE TO THEORY, *supra*, at 16; see DE MAN, ALLEGORIES OF READING, *supra*, at 14–15. It assumes that a text's vocabulary and syntax (i.e., its grammar) can mechanically generate the proper reading of that text. In the French legal context, it is a mode of reading premised on the notion that the vocabulary and syntax of the Civil Code can be applied directly to any fact scenario in order to generate the required legal solution.

Ronald Dworkin prefers to qualify such reading as "acontextual," rather than "literal" or "mechanical." See RONALD DWORCKIN, LAW'S EMPIRE 17–18, 89 (1986).

4. See, e.g., FRANÇOIS GÉNY, MÉTHODE D'INTERPRÉTATION ET SOURCES EN DROIT PRIVÉ POSITIF (2d ed. 1919). For a detailed analysis of Gény's critique, see *infra* part IV.

grammatical method offers no guidance should the grammatical operation of the Code generate multiple interpretations, or none at all. Forced to confront these problems and to make interpretive choices, French jurists have produced another mode of reading to guide and rationalize judicial decisions. This Article demonstrates that this mode of reading calls for the French judge to interpret the Code in terms of sociopolitical theories that are extrinsic to the Code's grammar. These sociopolitical theories attempt to explain and justify *why* the Code should be interpreted to mean something in a given situation. This mode of reading represents an interpretive ideology that seeks to generate meaning through *hermeneutics*.⁵

Because the sociopolitical theories used in the unofficial, hermeneutic mode of reading are all external to the grammar of the Code, they offer a portrait of the French judicial role that differs from the one implicit in the Code. This result is hardly surprising: The theories exist in response to the perceived interpretive limitations of the Code's grammatical method. What is remarkable, however, is the extent of the disjunction between the official and unofficial portraits. Examples of this disjunction surface periodically in French casebooks or law reports, when a given judicial decision is followed by a rather brief academic analysis, and especially on those rare occasions when a decision follows the published argument of a judicial *magistrat*.⁶ In such cases, the formal and grammatical discourse offered by the official judicial decision is juxtaposed with the interpretive policy discourse offered by the unofficial legal argument or academic analysis.

Because the unofficial discourse of the French judiciary has never been presented before, this Article analyzes it in detail. This analysis reveals that the French legal system simultaneously maintains two different conceptions of the role of the civil judge—two different portraits or two different interpretive

5. See DE MAN, *THE RESISTANCE TO THEORY*, *supra* note 3, at 56–57 (“Hermeneutics is, by definition, a process directed toward the determination of meaning; it postulates a transcendental function of understanding, no matter how complex, deferred, or tenuous it might be, and will, in however mediated a way, have to raise questions about the extralinguistic truth[–]value of literary texts.”). Hermeneutic reading seeks to produce the meaning of a text by interpreting it in terms of some historical, political, social, economic, religious, or other theory.

In his model analysis of the “rules of courtesy,” Dworkin describes hermeneutic approaches, which he calls “the ‘interpretive’ attitude,” as possessing two components. See DWORKIN, *supra* note 3, at 47.

The first is the assumption that the practice of courtesy does not simply exist but has value, that it serves some interest or purpose or enforces some principle—in short, that it has some point—that can be stated independently of just describing the rules that make up the practice. The second is the further assumption that the requirements of courtesy [are] . . . sensitive to its point, so that the strict rules must be understood or applied or extended or modified or qualified or limited by that point. Once this interpretive attitude takes hold, the institution of courtesy ceases to be mechanical . . . People now try to impose *meaning* on the institution . . . and then to restructure it in the light of that meaning.

Id.

6. The term *magistrat* comprises all French judges, including Justices of the Cour de cassation (the French Supreme Court in private law matters), as well as the advocates general, who are attached to the civil courts and who present arguments in an *amicus curiae* capacity. See *infra* note 48 and text accompanying notes 131–37.

ideologies. This Article pays particular attention to the relationship between the official (grammatical) and unofficial (hermeneutic) judicial portraits. On the one hand, the grammar of the official portrait constrains the possible unofficial hermeneutics; the unofficial, theoretical understanding of the legal system must somehow conform to the requirements of the Civil Code. On the other hand, the unofficial hermeneutic is not—by definition—the grammar of the official portrait. This hermeneutic diverges from, and appears in important respects to contradict, the grammar of the Code. This Article examines how and why these two portraits or interpretive ideologies exist simultaneously in the same legal system, as well as what interpretive, discursive, and rhetorical effects this coexistence produces.

The analysis proceeds as follows. Part II presents the finest of the traditional common law analyses of the French civil judicial system: John Dawson's *The Oracles of the Law*. Part III describes the elements of the French legal system that have been the traditional focus of comparative analysis, and that compose the official portrait of the French civil judge. Part IV reveals and explores those facets of the French legal system that have escaped systematic comparative analysis, and that form the unofficial portrait of the French civil judge; in particular, the internal and unofficial discourse of the French *magistrat*. Part V analyzes the relationship between the official and unofficial portraits. Part VI presents conclusions.

II. THE AMERICAN FRAME: JOHN DAWSON'S *THE ORACLES OF THE LAW*

The Oracles of the Law presents by far the most erudite and insightful American analysis of the French civil judicial system.⁷ Written in American legal realism's pragmatic tradition,⁸ it presents the French judicial system as

7. American comparative analysis of the French civil legal system has been dormant for over 25 years. John H. Merryman offers the only other significant American analysis. See JOHN H. MERRYMAN, *THE CIVIL LAW TRADITION* 40, 44 (1969). Merryman terms the rigid French conception of adjudication "civil law fundamentalism" or the French "folklore of judicial interpretation." Although suggestive, Merryman's analysis is extremely vague. This vagueness is primarily due to two factors. First, Merryman describes a civil law "tradition" common to all of continental Europe and Latin America, and thereby intentionally blurs the distinctions between the legal "systems" of particular civil law countries. *Id.* at 1-6. It is often quite difficult to tell, therefore, when Merryman is speaking about the French (as opposed to the German, Italian, or Argentinean) legal system. Second, Merryman intended his book to be an introductory text "designed," as the preface states, "for the general reader." Thus, Merryman's text does not contain a single footnote or endnote reference, and instead offers a brief list of recommended readings for the legal systems of all of continental Europe and Latin America. *Id.* at 163-65.

This Article will focus on Dawson's text for the simple reason that no other significant analysis of the French civil judicial system exists. Whatever attention common law academics have given the French legal system has focused on the growing importance of the French Constitutional Council, a reflection of the fascination of common law academics with the problem of judicial review. For the most thorough and interesting analyses of the French Constitutional Council, see JOHN BELL, *FRENCH CONSTITUTIONAL LAW* (1992); ALEC STONE, *THE BIRTH OF JUDICIAL POLITICS IN FRANCE: THE CONSTITUTIONAL COUNCIL IN COMPARATIVE PERSPECTIVE* (1992).

8. The great majority of Dawson's theoretical allusions are to the legal realist Karl Llewellyn. See, e.g., DAWSON, *supra* note 2, at xiv-xv, 455-56, 484.

the American system's formalist other. Dawson proposes that the French system functions on a rigid theory of adjudication that hampers the adoption of the case-law method's pragmatic techniques.⁹

According to Dawson, if England's long-standing, rigid theory of adjudication bars appellate judges from overturning their own established precedents,¹⁰ the French theoretical rigidity bars judges from establishing precedents in the first place. Noting that "[i]n the opinions of the [Cour de cassation] what is mostly missing is any reference whatever to prior decisions, either its own prior decisions or those of any other court,"¹¹ Dawson remarks that "[t]he central *conviction*, which still lies deep, is that judges cannot be lawmakers."¹²

Dawson traces the historical roots of this fundamental principle that judges cannot make law.¹³ "[M]odern French theories as to the role of judges are . . . a reaction against the excessive power and pretensions of the French judiciary under the old regime."¹⁴ Under the ancien régime, the French judiciary wielded extraordinary power. The Parlements, or regional high courts, possessed the authority not only to judge cases, but also to promulgate regulations, known as *arrêts de règlement*, applicable in the territory of their jurisdiction.¹⁵ Moreover, the Parlements possessed the power to protest and suspend—and even claimed the power to veto—royal acts by refusing to register them in the Parlements' official books.¹⁶

The contemporary French conception of the role of the civil judge was, according to Dawson, determined by "a revolution in which the judiciary was conceived as an enemy. Its survival to the present time must be partly explained by the fact that this specter has continued to haunt many fearful minds."¹⁷ The primary French reaction to judicial power was the establishment of a rigid separation of governmental powers, and "distrust of

9. See *id.* at 415–16.

10. *Id.* at 413.

11. *Id.* at 407.

12. *Id.* at 415.

13. Merryman does so as well, speaking of the "attitudes that led France to adopt the metric system, decimal currency, legal codes, and a rigid theory of sources of law, all in the space of a few years." MERRYMAN, *supra* note 7, at 26.

14. DAWSON, *supra* note 2, at 263.

15. *Id.* at 305–14; see also MERRYMAN, *supra* note 7, at 17, 37 (discussing lack of separation of powers under ancien régime).

16. See FELIX AUBERT, HISTOIRE DU PARLEMENT DE PARIS DE L'ORIGINE À FRANÇOIS IER (1250–1515) (Paris, A. Picard et fils 1894); FELIX AUBERT, LE PARLEMENT DE PARIS PHILIPPE LE BEL À CHARLES VII (1314–1422) (Paris, A. Picard 1890); DAWSON, *supra* note 2, at 305–14, 362–73.

In the waning years of the French monarchy, the Parlements, composed of entrenched nobility of the robe, refused to register royal legislation intended to promote moderate reform and to salvage the monarchy. "[T]hey foreclosed all hope of moderate reform, ensured that the wave would engulf them all, and earned for themselves a nation's wrath." *Id.* at 373.

17. DAWSON, *supra* note 2, at 375. Merryman speaks of French "civil law fundamentalist[s]," whose "utopian," "revolutionary" ideology sought to render law "judge-proof." MERRYMAN, *supra* note 7, at 19, 40, 50.

the judiciary played as large a part as the dictates of Montesquieu's logic in producing this strict separation."¹⁸ The supremacy of the legislature was the fundamental assumption of France's post-Revolution political system. "Law-making was not for the judiciary or executive; it was entirely reserved for the legislature. From this monopoly of the law-making function it seemed to follow that the only worthy subject of the interpreter's attention was code or statute, duly invested with the legislator's sanction."¹⁹

The French conception of the judicial role therefore relegates the judge to the secondary function of applying legislative provisions. The nineteenth-century School of Exegesis offered the most elaborate version of this theory:

[Its] first assumption was of course that the legislature possessed a monopoly of lawmaking power. The second assumption, not a necessary consequence of the first, was that the legislature had achieved complete coverage. This meant that for every problem there was a governing rule to be found in code or statute. The third assumption was that the whole body of legislation was internally consistent.²⁰

These assumptions, which are still "accepted by most authors though with variations of degree,"²¹ form the basis of the French conception of the judicial role.

Dawson objects to all three assumptions, arguing that codes alone cannot produce order,²² especially given "a changed and changing society" and "a Code that is now 160 years old though in its own basic provisions remarkably unchanged."²³ The net result of the rigid French theory of adjudication, according to Dawson, has been to force the French judge formally to adhere to its requirements while surreptitiously engaging in lawmaking.²⁴ Thus, since the 1790's, court decisions have "remained as laconic as before and sought to make it appear that the court in fact had had no choice,"²⁵ when in fact "the range of choice is enormously wide."²⁶ As Dawson categorically states, "In discussing this topic it seems best to start with a simple affirmation: France

18. DAWSON, *supra* note 2, at 376; *see also* MERRYMAN, *supra* note 7, at 19, 23.

19. DAWSON, *supra* note 2, at 392.

20. *Id.* at 393; *see also* MERRYMAN, *supra* note 7, at 30 ("But if the legislature alone could make laws and the judiciary could only apply them . . . such legislation had to be complete, coherent, and clear").

21. DAWSON, *supra* note 2, at 393.

22. *See id.* at 415 ("If one will grant, as some might not, that order is desirable and that codes alone cannot produce it . . . "); *see also* MERRYMAN, *supra* note 7, at 89 ("Although the legislature tries to provide a clear, systematic legislative response for every problem that may arise, legislative practice falls far short of this objective. As a result, judges have a lot of interpreting to do.").

23. DAWSON, *supra* note 2, at 401-02; *see also* MERRYMAN, *supra* note 7, at 44 ("Although the text of a statute remains unchanged, its meaning and application often change in response to social pressures, and new problems arise that are not even touched on by any existing legislation.").

24. *See* DAWSON, *supra* note 2, at 400-01.

25. *Id.* at 382.

26. *Id.* at 409.

has acquired case law in massive quantities."²⁷ Because of the requirements of the rigid French conception of adjudication, however, the French judiciary carefully masks this reality. From this observation, Dawson arrives at the following insightful conclusion:

The stereotyped style of modern [French judicial] opinions is a survival from a time that is now remote but that has not been forgotten. I suggest that the ideas that inspired the style have also survived, that the principal function of a high court opinion is to demonstrate to the world at large that the high court in exercising its exceptional powers has arrogated nothing to itself and is merely enforcing the law And so the format of the 1790's continues unchanged. The majestic parade of whereas clauses is cast as an exercise in logic, working down inevitably from some provision of Code or statute. It is the law that speaks. The judges are merely its instrument, though by now the whole process could be better described as extremely expert ventriloquism.²⁸

In the French judicial opinion, the judiciary appears to adhere to the passive and instrumental function required by the rigid French conception of adjudication. Given interpretive, historical, and social realities, however, it is the judge who surreptitiously controls.²⁹

This insight leads to what might be termed "Dawson's paradox." In the wake of the Revolution, the French attempted to limit judicial power by enforcing a strict separation of powers that asserted absolute legislative supremacy and categorically denied the legitimacy of judicial lawmaking. This approach required an untenable conception of adjudication premised on simple judicial application of preexisting Code or statute provisions. This conception—which is still dominant—has led, paradoxically, to greater judicial power. French judicial discretion is exercised under the guise of the mere application of Code or statute. Supposedly forbidden to make law in the first place, the French judge is under no pressure to rationalize and justify decisions in any significant sense. He is left entirely to his own devices. Dawson concludes: "A principle directed toward restraining judicial power thus serves to enlarge it."³⁰

27. *Id.* at 400; see also MERRYMAN, *supra* note 7, at 151 ("All know that much of the law actually in force is found in the reports of judicial decisions, not in the Code Napoléon.").

28. DAWSON, *supra* note 2, at 410–11.

29. Even though formal respect is paid to the provisions of the code, the fiction that these provisions actually offer solutions to the problems that come before the courts has been worn thin by more than a century and a half of creative judicial lawmaking. . . .

. . . In France much of the power of the old code to impede social and economic progress has been reduced by a creative judiciary.
MERRYMAN, *supra* note 7, at 151.

30. DAWSON, *supra* note 2, at 431.

To Dawson, the proper question is not *whether* judges possess the power to make law, but *how* that power should be exercised. He advocates the explicit adoption of case-law techniques, which would permit and require a "reasoned elaboration," by judges, of the grounds for their decisions. These grounds would carry a commitment: They would guide and constrain the judiciary in its necessary role as mediator between the old and the new, between the law as previously applied and the law as it must be created for the future. "For these [case-law] techniques, administered by expert judges with candor, have the purpose of enlisting them in a common enterprise—that of maintaining continuity, coherence, and order in the inevitable process of new creation."³¹

Dawson argues that French judges, who do not and cannot speak candidly about what they do, use a cryptic style of expression that does not permit the adoption of a reasoned and effective case-law method.³² French judges, Dawson duly notes, do not decide cases in a "random" fashion;³³ but they "have no responsibility for shaping, restating and ordering the doctrine that they themselves produce."³⁴ The damaging effects are twofold. First, the legal system is deprived of a "key" method of ordering the law developed and created by its judges.³⁵ Second, French judges operate individually, entirely unaccountable to, and uncontrolled by, "[a]n effective case-law technique [that,] employed by judges through the medium of the reasoned opinion, with the responsibilities that it should entail, has the purpose and should have the effect of limiting the powers of judges."³⁶ Dawson therefore concludes his analysis of French law with the following image: "Behind the cascades of whereas clauses one can still see stalking the ghostly *magistrats* of the Parlements, majestic in their moldy red robes."³⁷

Dawson thus presents the French legal system as fatally hampered by its formalist conception of adjudication. Dawson explains that French academics and *magistrats* are aware of the creative and normative role actually exercised by the French judiciary. But he claims that their adherence to the formalist conception has precluded the effective and pragmatic use of the French judiciary's case law.

31. *Id.*; see also *id.* at 375 ("[T]he notion that judges could not make law offered a justification for ignoring the heavy case-law gloss that courts had already laid on the codes. The denial of their law-making power thus had the effect, strangely enough, of leaving the courts more free."), *id.* at 431 ("The judges joined in this disclaimer and expressed it through a cryptic style of opinion writing whose main purpose was to prove their dutiful submission but which left them in fact more free.")

32. *Id.* at 416 ("Courts have been deterred from reasoned elaboration of their own grounds for decision by their cryptic and formalized modes of expression.")

33. *Id.* at 409–10 ("[T]he results reached in particular cases usually become intelligible when matched with the results of other cases [O]ne usually discovers continuity in patterns of action, realism, and practicality in the solutions reached.")

34. *Id.* at 415.

35. *Id.*

36. *Id.*

37. *Id.* at 431.

This Article demonstrates that Dawson overestimates the predominance of the formalist conception of adjudication, resulting in a skewed account of how the French legal system actually operates. The formalist conception, which I call the "official French portrait" of the civil judge and of the judicial role, has long been critiqued by French *magistrats* and legal academics. This Article shows how the French legal system has in fact *internalized* these critiques: It has responded to them in both academic theory and judicial practice; and it has done so in a discursive sphere constructed *within* the French judicial system.

III. THE OFFICIAL FRENCH PORTRAIT OF THE CIVIL JUDGE

The official French portrait of the civil judge represents an image of the judge in the performance of his or her proper role. Officially, the civil judge mechanically applies legislative provisions to given fact situations.³⁸ It is the statutory law—especially the Civil Code—that determines cases. Its matrix generates outcomes in a grammatical fashion. This grammatical interpretive ideology is the product of several constitutive elements. Legislative provisions define the place of the judiciary in the French system of separation of powers and delineate basic rules concerning the proper execution of the judicial role. Judicial application and interpretation of these legislative provisions establish and enforce a specific reading of these provisions. Finally, the formal structure of the French civil judicial decision conveys a specifically grammatical conception of the judicial role implicit in the very production of such decisions.

This Part lays out the primary constitutive elements of the official portrait of the civil judge: legislative rules, judicial interpretation and application of these rules, and the form of the French judicial decision.

A. *Legislative Rules*

A small core of fundamental rules forms the statutory basis of the official French portrait of the civil judge. Most of these rules were passed in the early days of the French Revolution, and in the Civil Code, promulgated under Napoleon in 1804. They define the parameters of the judicial role within the traditional French conception of the separation of powers.

The five fundamental legislative rules state the following:

38. See MERRYMAN, *supra* note 7, at 37–38 ("The picture of the judicial process that emerges is one of fairly routine activity. The judge becomes a kind of expert clerk. . . . The net image is of the judge as an operator of a machine designed and built by legislators. His function is a mechanical one."). See generally Mauro Cappelletti, *The "Mighty Problem" of Judicial Review and the Contribution of Comparative Analysis*, 53 S. CAL. L. REV. 409 (1980); Michael H. Davis, *The Law/Politics Distinction, the French Conseil Constitutionnel, and the U.S. Supreme Court*, 34 AM. J. COMP. L. 45 (1986).

1. "The courts may not directly or indirectly take any part in the exercise of the legislative power, nor prevent or suspend the execution of the decrees of the Legislative Branch . . . under pain of forfeiture."³⁹
2. "Judicial functions are distinct and will always remain separate from the administrative [executive] functions. Judges may not, under pain of forfeiture, disturb, in any way whatever, the operations of the administrative [executive] bodies"⁴⁰
3. "It is forbidden for judges to make pronouncements [to rule] by means of general and regulatory provisions on the cases submitted to them."⁴¹
4. "The authority of the matter adjudged only relates to that which has been the object of the judgment. The petition must be the same; it must be founded on the same cause; it must be between the same parties, and formulated by and against them in their same capacities."⁴²
5. "The judge who refuses to judge, under pretext of the silence, obscurity or insufficiency of the law, will be subject to prosecution for denial of justice."⁴³

The first two of these provisions, enacted as part of the Law on Judicial Organization, establish and enforce the separation of powers.⁴⁴ These provisions also strike at specific judicial prerogatives that existed prior to the Revolution. In particular, they forbid the old Parlements' practice of passing regulations, as well as the suspension (and possible veto) of legislation by the Parlements' refusal to record it in the courts' official registers.

The latter three provisions are drawn from the Civil Code; they further define the judicial role within the general parameters of the judicial power established by the Law on Judicial Organization. The first of these provisions, Article 5, forbids judicial lawmaking by explicitly proscribing two possible modes of judicial pronouncements in court decisions. The prohibition against "general . . . provisions" proscribes the judicial creation of self-imposed general or iterable rules. The provision against "regulatory provisions" strikes explicitly at the pre-Revolution judicial practice of establishing formal regulations (*arrêts de règlement*).⁴⁵ Article 5 therefore prohibits judges from establishing any rule capable of application in later cases. In short, the judiciary is denied normative power.

39. Code de l'organisation judiciaire tit. II, art. 10, Aug. 16–24, 1790 [hereinafter *The Law on Judicial Organization*].

40. *Id.* art. 13.

41. CODE CIVIL [C. CIV.] art. 5.

42. *Id.* art. 1351.

43. *Id.* art. 4.

44. For a thorough discussion of the French separation of powers, see Burt Neuborne, *Judicial Review and Separation of Powers in France and the United States*, 57 N.Y.U. L. REV. 363 (1982).

45. See *supra* text accompanying note 15.

Article 1351, the second of these provisions, represents the technical apparatus by which the Article 5 prohibitions are put into effect. No judicial decision can exert authority over another controversy unless there is equivalence in thing sued for, as well as identity of cause, parties, and quality of the parties. Articles 5 and 1351 require the individual treatment of cases.⁴⁶

Article 4, the last provision, requires judges to adjudicate all cases. This provision can readily sustain widely divergent—even contradictory—readings. One interpretation is that there are no silences, obscurities, or insufficiencies in the law, and that any judge who refuses to rule on such grounds therefore does so on a mere pretext. Another interpretation is that such silences, obscurities, and insufficiencies actually do exist, but that judges must rule nonetheless. The grammar of the Code offers little help in resolving this interpretive ambiguity.⁴⁷

B. *Judicial Interpretation of the Legislative Rules*

The leading French judicial case on the proper (or improper) role of the civil judge is a damage award case, decided by the Cour de cassation in 1955.⁴⁸ The trial court held Mr. Fouchereau partially liable for the injuries caused to Mr. Cornet in an accident, and ordered monetary reparations. The appellate court, without questioning the extent of Cornet's injuries or the responsibility of Fouchereau, nonetheless lowered the amount of reparations owed to Cornet. The appellate court stated as follows:

“[T]hat without contesting the fall in Cornet's income after the accident nor underestimating the personal extent of his productive activity and the effect of his permanent partial disability on this activity, the court believes itself unable to go beyond its usual maximum assessment in such matters, and that there is good reason to evaluate at 2,500,000 francs the compensation related to this disability.”⁴⁹

46. On its face, Article 1351 states nothing more than the doctrine of *res judicata*. It is included in this Section as a provision that is fundamental to the French judicial role because the doctrine has been interpreted somewhat differently in France than it has been in common law countries. See *infra* text accompanying note 61.

47. Note that the very provision addressing ambiguity is itself ambiguous.

48. See Judgment of Nov. 3, 1955, Cass. crim., 1956 Recueil Dalloz [D. Jur.] I 557. This decision was actually rendered by a section of the criminal chamber. The French legal system permits criminal courts to rule on the civil reparations owed to the victim of a crime.

The Cour de cassation is the highest court in the French civil law hierarchy. It is composed of approximately 100 Justices. The Cour is divided into six “chambers.” One handles criminal cases, and five handle private law cases (cases involving civil law per se, commercial law, social security law, etc.). See ROGER PERROT, INSTITUTIONS JUDICIAIRES 206-07 (3d ed. 1989). The civil chambers of the Cour handled some 18,049 cases in 1992. See 1992 RAPPORT DE LA COUR DE CASSATION app. tbl. A.1 (1993) [hereinafter ANN. REP.].

49. Judgment of Nov. 3, 1955, 1956 D. Jur. I at 557 (quoting Judgment of Dec. 10, 1953, Cour d'appel de Poitiers).

The Cour de cassation quashed the appellate court's decision, reasoning that the appellate court modified the lower court's decision

on the sole ground that "the court believes itself unable to go beyond its usual maximum assessment in such matters," although, judges being unable to pronounce by way of general and regulatory disposition on the claims that are submitted to them and the defining characteristic of damages being to repair entirely the prejudice, the court . . . could not limit compensation for a prejudice, the extent of which it recognized, by claiming itself bound by "its usual maximum assessment in such matters," and thus, at the least, by so ruling, by reference to "its usual maximum assessment in such matters," the challenged decision . . . did not give a legal basis for its decision . . . ; but whereas it is forbidden for judges to pronounce by way of general and regulatory disposition on the claims submitted to them; whereas if, in matters of damages resulting from a crime or misdemeanor, [solely the lower court judges are empowered to determine] . . . the due reparations, they may not refer, in particular cases, to rules established in advance to justify their decision; whereas, there was, consequently, a violation of the texts alluded to in the claim;

On these grounds, quash[]⁵⁰

In this opinion, the Cour de cassation quashes an appellate court decision that had justified lowering a trial court's damage award on the sole basis that it exceeded the amount usually awarded in such cases. The Cour's fundamental problem is that the appellate court "'believes itself unable to go beyond its usual maximum assessment in such matters.'"⁵¹ Deference by a court to its own "usual maximum assessment in such matters" posits the existence and application, in violation of Article 5 of the Civil Code, of a predetermined judicial rule on how to calculate damages. According to the Cour de cassation, however, the statement is problematic for other reasons as well. The problem is not only that the judiciary has exercised legislative power by establishing a rule, but also that it has not properly exercised its judicial power: Civil courts cannot bind themselves with preestablished rules of their own making.

Can a civil court, then, make any reference at all to past judicial decisions? The short answer is yes. As a practical matter, however, they rarely do, if only because the Cour de cassation has established a series of rules limiting how they may make such references. Courts are forbidden, as we have just seen, to refer to their past cases as the sole basis for their decisions.⁵² Similarly, courts may not rule based on the mere application of principles posited in a

50. *Id.*

51. *Id.*

52. See also Judgment of Feb. 27, 1991, Cass. soc., 1991 Bull. Civ. V, No. 102; Judgment of Mar 27, 1991, Cass. civ., 1991 Bull. Civ. III, No. 101.

previous case.⁵³ For instance, a French appellate court decision was quashed for stating "that there is occasion to apply to this case the principles already posited in the *Lafeuille* decision."⁵⁴ The Cour de cassation ruled that "a mere reference by the judge to principles posited in a preceding decision rendered between different parties" did not constitute appropriate legal grounds for a judicial decision.⁵⁵

Another appellate decision was quashed for finding it unnecessary to state facts that had already been discussed in previous cases, and for stating that "the Court is conforming expressly to its *jurisprudence* on this issue as established by several judgments rendered on April 4th, 1892 . . . [and] in referring to its *jurisprudence*, the Court must declare this appeal inadmissible or at the very least unfounded."⁵⁶ Stating that "a judgment must be self-sufficient," the Cour de cassation found that the appellate decision, which "does not explain itself either on the facts to which it refers, nor on the so-called *jurisprudence*," had no legal basis because "what is missing . . . from the denounced judgment cannot be filled in by what is in other judgments rendered in similar cases."⁵⁷ Of particular interest, beyond the substantive holding of the case, is the Cour de cassation's transparent annoyance: It objects to the appellate court's reference to its "*so-called jurisprudence*."⁵⁸ The Cour is unwilling to grant that such a *jurisprudence* could exist in the first place.

The issue then becomes how the French define the ambiguous term "*jurisprudence*." In French legal terminology, *jurisprudence* may mean a court's (1) past decisions, (2) precedents, or (3) judicial doctrine on a particular legal issue. When the term simply means past court decisions, judicial reference to such decisions is considered acceptable. Cour de cassation decisions have permitted such judicial reference, i.e., mere citation, to *jurisprudence* (in the limited sense of past court decisions). But when the term also encompasses the notion of consistent judicial doctrine, then the separation-of-powers problems recur. The official French judicial portrait, as produced by substantive legal decisions, denies the viability of consistent and judicially created doctrine.

53. See Judgment of Feb. 4, 1970, Cass. crim., 1970 Recueil Dalloz [D.S. Jur.] 333. An interesting and increasingly important exception is the judicial elaboration of "general principles of law," which must be disclosed by a court if they form the basis of a decision. See, e.g., Judgment of Feb. 1, 1881, Cass. req., 1882 Recueil Périodique et critique [D.P.] I 113. For a discussion of these general principles of law, see Richard J. Cummins, *The General Principles of Law, Separation of Powers and Theories of Judicial Decision in France*, 35 INT'L & COMP. L.Q. 594 (1986).

54. Judgment of June 6, 1894, Cass. req., 1894 D.P. I 336, 336 (quoting Judgment of Nov. 3, 1891, Cour d'appel de Limoges).

55. *Id.*

56. Judgment of Nov. 20, 1895, Cass. req., 1896 D.P. I 326, 326; see also Judgment of July 24, 1967, Cass. crim., 1967 Recueil Sirey [J.C.P.] II, No. 68 (vacating decision that rested solely on lower court's *jurisprudence*).

57. Judgment of Nov. 20, 1895, 1896 D.P. I at 327.

58. *Id.*

The Cour de cassation has therefore determined that a judge can refer to *jurisprudence* as long as such a reference does not constitute “the determinative argument of his decision.”⁵⁹ For this reason, appellate judges cannot even refer to *jurisprudence* of the Cour as the legal basis for overturning a decision, nor will the Cour sustain appeals on the basis of a lower court’s violation of the Cour’s own *jurisprudence*. The Cour will not even entertain such an appeal.⁶⁰ The substantive rules produced by the French judiciary turn on the distinction between what is (and what is not) considered determinative or authoritative in judicial decisions—i.e., the distinction between legislation and *jurisprudence*.

The interpretation of Article 1351 of the Civil Code also plays an essential role in the judicial contribution to the official French portrait of the civil judge. Article 1351 appears to be nothing more than the doctrine of *res judicata*; nonetheless, in conjunction with Article 5 of the Code and with the assorted statutes concerning the “motivation” of decisions, it has been judicially construed to produce results particular to the French legal system.

The Cour de cassation has interpreted Article 1351 to mean that *res judicata* can apply only to the actual holding of a particular case.⁶¹ The judicial reasoning underlying the judgment, however, cannot exert “the authority of a matter adjudged.”⁶² While the substance of a decision is thus transposable in certain limited situations, the judicial reasoning is not. The only exception is the reasoning that is the necessary support of the judgment.⁶³ Of course, even this reasoning can only be transposed to cases satisfying the requirements of Article 1351—that is, cases involving, *inter alia*, identical parties. What this means, as a practical matter, is that judicial reasoning from one decision can never determine the outcome of an unrelated case. According to the judicial construction of the requirements of the Civil Code, this should come as no surprise; if judicial reasoning from one case could determine the judgment in another, this reasoning would constitute a judicial rule, thus violating the Article 5 ban on “general and regulatory provisions.” As the French judiciary has interpreted the Code, Articles 5 and 1351 work in tandem, the latter being the necessary corollary of the former.

59. Judgment of Jan. 14, 1958, Cass. crim., 1958 Bull. Crim., No. 58, at 65

60. The Cour states, in the opening section of a tellingly dismissive decision, that it will not “pause [to consider] the argument [concerning] the violation of judicial doctrine that cannot, of itself, give rise to the quashing of a decision.” Judgment of Dec. 21, 1891, Cass. req., 1892 D.P. I 543, 543. Such an appeal is too ridiculous to be considered. Of course, had the appeal claimed that the appellate court had misapplied or “violated” the statute in question, and if the Cour de cassation’s *jurisprudence* did in fact run counter to the interpretation produced by the appellate court, the Cour would not only have considered the appeal, it would likely have quashed the appellate court’s decision.

61. See, e.g., Judgment of May 14, 1991, Cass. com., 1991 Bull. Civ. IV, No. 160

62. See, e.g., Judgment of Apr. 5, 1991, Cass. civ. 2e, 1991 Bull. Civ. II, No. 109, at 59

63. See, e.g., Judgment of June 13, 1966, Cass. civ. 1re, 1966 D.S. Jur. I 714; Judgment of Oct. 6, 1954, Cass. civ. 1re, 1955 Recueil Sirey [S. Jur.] I § 8458, No. 2; Judgment of Jan. 4, 1954, Cass. civ. 1re, 1955 S. Jur. I § 8458, No. 1; Judgment of Feb. 21, 1900, Cass. civ. 1re, 1905 D.P. I 271.

C. *The Form and Structure of the French Judicial Decision*

The form and structure of the French civil judicial decision represent the final—and perhaps most important—elements of the official portrait. The form and structure of French civil judicial opinions offer an image of what French civil judges do, an interpretive ideology of how the judges have gone about deciding the case in question.

All decisions of the Cour are composed in a single sentence structured in the following manner:

The Court,
 (a) Given [numerical citations of the legislative texts] . . . ;
 Whereas . . . ;
 Whereas . . . ;
 (b) On these grounds, [holding].⁶⁴

As Mimin explains in his authoritative treatise on the style of the French judicial opinion: “Grammatically, a) and b) are part of a single sentence: in b) are the verbs of the principal propositions, and in a) are the relative propositions of these verbs. One must insist on a grammatical structure that leads to necessary consequences.”⁶⁵ This paradigmatic form has existed unchanged since the Revolution. The basic structure of the French judicial opinion was first established by the Law on Judicial Organization of 1790, which states the following:

The drafting of judgments, on appeal as well as in the first instance, shall contain four distinct parts—In the first, the names and qualities of the parties will be stated—In the second, the questions of fact and law that constitute the case will be formulated with precision—In the third, the result of the facts recognized or noted by the instruction, and the reasoning that will have determined the judgment, will be expressed—The fourth will finally contain the ruling of the judgment.

A single example of the classic judicial opinion, quoted in full, will suffice to demonstrate its basic form and structure:

(Bossoul C. Laffeuille et comp.)—decision

THE COURT;—On the first part of the second claim:—Given Article 7 of the Law of Apr. 20, 1810;—Whereas, to do justice to the appeal of Laffeuille & Co. and reject Bossoul’s request for damages, the challenged decision (Cour d’appel de Limoges, Nov. 3, 1891) limits itself to declaring in its reasoning “that there is occasion to apply to this case the principles already posited in the *Lafeuille and*

64. See, e.g., DAWSON, *supra* note 2, at 407.

65. PIERRE MIMIN, *LE STYLE DES JUGEMENTS* 187 (4th ed. 1962).

Chaumeil v. Lachaud decision of the preceding October 24th;—Whereas the contractors were not held to assign entirely to the insurance the deduction of 2% on the salary of its workers, and that according to the terms of the policy, they owe the appellee only the sum of 150 francs”;—Whereas one could not legally find grounds for a decision in a simple reference by the judge to principles posited in a previous decision handed down between other parties;—Whereas nor could one find them in affirmations that are but the consequence of this reference;—Whereas, consequently, by ruling as it did, the Cour d’appel de Limoges violated the legal provision cited above;—On these grounds, and without it being necessary to rule on the first claim of the appeal nor on the second part of the second claim;—Quashes.⁶⁶

Several formal aspects of this decision are striking. To begin with, it is remarkably brief. The decision is, after all, a decision of the highest civil court in France. American common law jurists might have expected more.⁶⁷ The length of the quoted opinion is representative, however, of French Cour de cassation decisions.⁶⁸ Furthermore, the decision is structured logically and grammatically according to the standard model delineated above.⁶⁹

The formal, single-sentence structure of the French judicial decision resists any discourse that might hamper its smooth grammatical flow. Any discussion that would introduce uncertainty or debate into the text of the decision, thereby tending to complicate the grammar of the sentence, conflicts with the very structure of the decision. “Grammar alone would severely restrict any reasoned discussion of past decisions.”⁷⁰ It is difficult to imagine attempts at inserting contemporary policy discussion into a single sentence, especially one grammatically structured in the traditional French mold. Serious discussion of interpretive difficulties would be no less problematic. How might countervailing policy interests or divergent legal interpretations be introduced? By using the conjunction “but,” yielding the phrase “but whereas”? Mimin does address this possible phrase in his book, but in a section entitled “Words without a function.”⁷¹

The French judicial decision, in its paradigmatic form, possesses a univocal quality that denies the possibility of alternative perspectives,

66. Judgment of June 6, 1894, Cass. req., 1894 D.P. I, 336, 336.

67. See DAWSON, *supra* note 2, at 411.

68. Mimin offers the following explanation: “Almost obligatorily dry, the judicial style would soon give the impression of being platitudinous, even inane, if one were to venture into overly developed narration.” MIMIN, *supra* note 65, at 208.

69. See *supra* text accompanying note 64; see also MIMIN, *supra* note 65, at 185 (“In France, judicial decisions are cast in a familiar mold.”).

70. DAWSON, *supra* note 2, at 407.

71. MIMIN, *supra* note 65, at 163–69. Nonetheless, the construction “but whereas” is not uncommon in French court decisions. It usually marks the court’s formal refutation of an argument made by one of the parties. It is therefore used authoritatively, not as a means to express doubt or the existence of conflicting possibilities.

approaches, or outcomes. This univocal quality is further promoted by the collegial style in which the decisions are rendered. The French judicial decision is rendered by the entire court as a unit; individual judges do not sign opinions. Dissenting and concurring opinions are forbidden.

The voice of the French judicial decision takes a particular form. The grammatical structure of the decision requires that the decision be composed in the third person singular. In the French judicial opinion, it is "The Court" that speaks. The grammar therefore not only promotes a univocal judicial statement, but also prevents the personalization of the statement; the signed judicial "I" does not exist. The French judge is not personalized, and the French judicial decision is not a matter of personal opinion.

The grammatical and structural form of the judicial decision portrays the depersonalized judge as merely plugging applicable legislative provisions and the bare minimum of relevant facts into the formal mold, mechanically producing the judgment. The mechanics of the French judicial decision is that of the "judicial syllogism": "In France, the decision is as short as possible, as irrefutable as possible. Our ideal is the decision ten to fifteen lines long constituting, if possible, a syllogism with a major [premise], a minor [premise], and an unstoppable conclusion."⁷² The given legislative provision constitutes the major premise, the facts constitute the minor premise, and "the declaration of what the statutory law commands regarding the controversy" forms the conclusion.⁷³ According to the structure of the civil judicial decision, it is exclusively the statutory law that dictates the outcome of legal controversies.

This appearance of mechanical judicial application is further advanced by another stylistic peculiarity of the French judicial decision: The legislative enactments or Code provisions that form the basis of the decision are merely cited by number.⁷⁴ The legislative text itself rarely appears. The typical French appellate judicial decision will therefore read: "The Court;—Given Articles 47 and 1251 of the Civil Code; Whereas plaintiff did *x*; Whereas defendant did *y*; Whereas the lower court ruled *z*;—On these grounds, rejects the appeal." The Code provision is an absolute given that generates, almost algebraically, the decision. When portions of the text of the given Code provision do surface in the text of the decision, they are not set off by quotation marks. There is no distance between the legislative text and the judicial text. The statutory law speaks through the court.

72. André Tunc, *La Cour de cassation en crise*, in 30 ARCHIVES DE PHILOSOPHIE DU DROIT 157, 165 (René Sève ed., 1985).

73. EVELYNE SERVERIN, DE LA JURISPRUDENCE EN DROIT PRIVÉ 70 (1985) (quoting argument of Mr. Garat the elder against the plans presented by Mr. Dupport and Mr. Sieyes to the Assemblée Nationale) (citation omitted).

74. The Cour de cassation formally ruled on the legality of this canonical judicial practice in Judgment of Aug. 2, 1875, Cass. req., 1876 D.P. I 260, 261.

The French civil judge, as portrayed by the very form of the judicial decision, thus appears as a passive agent of the statutory law. Montesquieu states, in a passage quoted by French legal academics for more than two hundred years, that judges should be "the mouth that pronounces the words of the law, inanimate beings who can moderate neither its force nor its rigor."⁷⁵ The form and structure of the French judicial decision portray the civil judge as just this kind of mechanical mouth; he does no more than apply legislative provisions, leading to required outcomes already determined in the matrix of statutory law. It is in this sense that the French civil judge has often been described as a "syllogism machine."⁷⁶

IV. THE UNOFFICIAL FRENCH PORTRAIT OF THE CIVIL JUDGE

In the Article 5 case discussed above, the Cour de cassation quashed an appellate decision lowering a damage award that exceeded the "usual maximum assessment" in such matters.⁷⁷ As published in the *Recueil Dalloz*,⁷⁸ the Cour's opinion is immediately followed by a case note authored by one of France's most influential academics, René Savatier:

That there exists, in each jurisdiction, a sort of regular scale for the calculation of damages, especially concerning the evaluation, always difficult and somewhat elastic, of the consequences of an injury, this is a well-known fact. Not only is this practice general, but also beneficial. It is a limitation, based on experience, that the judge places on his arbitrariness. . . .

One can well understand the judge's private qualms expressed by the quashed decision, qualms whose expression, however, earned him the censure of the supreme Cour. . . .

But one also understands perfectly well the blame of the Cour de cassation in the face of this public revelation, made by the judge, of the systematic method by which he had overcome his scruples.

But this method, somehow validated by the appellate decision, and presented as the grounds justifying and determining the judgment, was not easily reconciled with Article 5 of the Civil Code⁷⁹

This case note is a crack through which one can glimpse an entirely different portrait of the French civil judge. Savatier readily acknowledges, and even praises, the prevalence of systematic judicial rules that guide the calculation of damages. It is not the violation of Article 5 per se that he is criticizing, but

75. 1 CHARLES DE SECONDAT, BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* 163 (Anne M. Cohler et al. eds. & trans., 1989) (1748).

76. See, e.g., 1 JEAN CARBONNIER, *DROIT CIVIL* 18 (1967) ("[T]he judge is a man and not a syllogism machine.").

77. See *supra* text accompanying notes 48–52.

78. The *Recueil Dalloz* is the French equivalent of the West Reports.

79. Judgment of Mar. 11, 1955, Cass. crim., 1956 D.P. 1 557, 557–58 note R. Savatier.

rather the public revelation of such judicial rules. Savatier's conception of the role of the civil judge differs dramatically from the role presented by the official French portrait.

This Part explores the "unofficial" portrait of the civil judge as it is reflected in, and produced by, mainstream French academic theory (*doctrine*)⁸⁰ and the argumentation of judicial *magistrats*. This portrait necessarily will be a composite of diverse conceptions of the civil judge. Nonetheless, the great majority of these academic and judicial conceptions share certain basic assumptions. The "unofficial" portrait presented here is intended to represent a "greatest common denominator" conception of the French civil judge, as understood by the French legal profession itself.

This Part demonstrates that there exists, *within* the French legal system, a vibrant discursive sphere in which French *magistrats* and academics operate on the assumption that the judicial role is quite different from that implicit in the official portrait. In this unofficial discursive sphere, French academic theory and judicial practice take into account, as a matter of course, most of the kinds of critiques that Dawson levels at the French adjudicatory system.

A. Mainstream French Academic Doctrine

Mainstream French academic *doctrine*, which both reflects and informs French legal consciousness, represents an important element of the unofficial portrait of the judicial role. French legal scholars identify 1899, the year of François GénY's first publication of *Méthode d'interprétation*,⁸¹ as the birth of "modern" French legal consciousness.⁸² GénY's book presented a scathing, Realist-style critique of the mechanical and formalist judicial practice of his day. Since GénY, every major twentieth-century French analysis of the civil legal system has worked from the following three assumptions: (1) the Codes inevitably contain gaps, conflicts, and ambiguities inherent in the text itself and produced by the evolution of modern society; (2) the perfectly formalist conception of unproblematic, passive, and grammatical adjudication is therefore no longer tenable; and (3) the judiciary has in fact played—if only by necessity—a fundamental role in the establishment and development of legal norms. This Section presents an overview of the primary concerns of the major French academic theories of adjudication.

80. The French term *doctrine* traditionally refers to academic scholarship and legal commentary. It has been generally left untranslated (and is italicized) in order to distinguish it from the common law notion of "judicial doctrine." As will be explained, however, the term has begun to acquire interesting new connotations. See *infra* part IV.C.4.

81. 1 GÉNY, *supra* note 4.

82. See, e.g., SERVERIN, *supra* note 73, at 145.

1. *The Critique*

For the nearly one hundred years since GénY first attacked “that fetishism of the written and codified statutory law,” which constituted “the most distinctive and . . . most salient trait” of nineteenth-century academic and judicial practice,⁸³ “modern” French *doctrine* has critiqued the rigid theory of adjudication implicit in what I have been calling the official portrait of the civil judge. The first target has been the notion of complete legislative coverage, “that pretentious notion that, under the reign of modern codification, wishes to find, simply in the dispositions of written law [legislation], all legal solutions.”⁸⁴

According to French *doctrine*, two insurmountable hurdles render complete legislative coverage impossible: human imperfection and the incessant evolution of society over time. As GénY states, “even if one could imagine . . . a legislator sufficiently perspicacious to penetrate, with a far-ranging and profound gaze, the whole of the legal order of his time, . . . he still would be unable to foresee . . . all *future* relations.”⁸⁵ Modern French *doctrine* therefore works under the assumption that legislation must inevitably contain gaps.⁸⁶

The debunking of the myth of complete legislative coverage leads to a critique of the mechanical and syllogistic means by which the “traditional” French method of interpretation seeks to fill legislative gaps. As GénY states: “a) there are points requiring legal resolution that are not foreseen and settled by the statutory law; b) logic remains powerless to fill all the gaps resulting from the insufficiency of the texts.”⁸⁷ Despite this problem, notes the French academic, the French judicial decision maintains its perfectly syllogistic form, as if the Code were grammatically generating all legal solutions.

French *doctrine* almost universally concludes, therefore, that the traditional form of the civil judicial decision masks important facets of judicial practice. As Jean Carbonnier states:

83. 1 GÉNY, *supra* note 4, at 70.

84. 1 *id.* at 97.

85. 1 *id.* at 117.

86. See, e.g., SADOK BELAID, *ESSAI SUR LE POUVOIR CRÉATEUR ET NORMATIF DU JUGE* 73–74 (1974) (arguing that complete legislative coverage is a “fiction”); Tunc, *supra* note 72, at 159 (arguing that existing and future gaps in law must be filled).

87. 1 GÉNY, *supra* note 4, at 195.

[I]t becomes totally unacceptable, when one starts from precepts emanating from an arbitrary will (written legislation), to extend them beyond the conditions that they specify. The conditions foreseen by the statutory law no longer being precisely in operation, the issue becomes whether the same prescription should apply, or whether it is the occasion, on the contrary, to establish another one. But when it comes time to choose between these two opposing procedures (arguments by analogy or *a contrario*)—and such a choice is thrust upon us by all written precepts as soon as one moves beyond their texts—logic is manifestly powerless: This [choice] requires the consideration and estimation of moral, political, and economic factors that are manifestly developed outside of the texts . . .

1 *id.* at 198–99.

Quite often, contrary to the classic syllogism where they should descend from the legal rule to the concrete decision, [judges] start by positing the concrete decision that strikes them as humanly desirable, and then endeavor to work back to a legal rule. Things must always have happened this way since . . . there have always been judges, and judges who think.⁸⁸

Given that legislative gaps exist, that logic cannot fill them, and that they are nonetheless filled when cases are decided, it is the judge who must be filling the gaps.

Modern French *doctrine* therefore takes it for granted that the judiciary plays a significant role in the creation and development of legal norms. Carbonnier, for example, states:

[Modern *doctrine*] accepts that the judge be a creator, and not just an interpreter . . . That judgments, insofar as they imply judicially constructed rules, must be seen as being part of the totality of the law, is hardly contested today when it is commonly declared that law can be judicial as well as legislative . . .⁸⁹

French *doctrine* accepts the judiciary's creative normative role to such a degree that mainstream academics such as Professor Tunc can state, without explanation,⁹⁰ that "as often happens today, . . . [the Cour de cassation] truly creates a rule of law."⁹¹

2. *The Justifications*

Modern French *doctrine* has produced several theories designed to explain, guide, and justify how and why the civil judiciary exercises creative normative power when confronted with insufficiencies in the legislative code. The first of these theories, advanced by Gény, is "free scientific research."

88. 1 CARBONNIER, *supra* note 76, at 35–36. In support of this proposition, Carbonnier cites Joseph Hutcheson, *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L.Q. 274 (1929). Similarly, Belaid claims that:

Interpretation can actually cover a *work of pure creation* . . . Certainly, in the performance of this task, it is traditional . . . that the judge hide his creative work and the originality of his contribution behind the mask of faithful interpretation and of strict observance of the will of the legislator. But as Gény said, one should not be duped by words or by appearances.

BELAID, *supra* note 86, at 80.

89. 1 CARBONNIER, *supra* note 76, at 33–34.

90. Belaid does offer the following atypical explanation:

The obligation to judge founds the creative power of the judge—the obligation implies the power . . . In order that he may rule on all the conflicts that will be submitted to him and correctly fulfill this obligation, it must implicitly be admitted that the judge disposes of the proper means to perform his mission. The power to create legal rules is an *implicit competence* of every judicial function.

BELAID, *supra* note 86, at 271.

91. Tunc, *supra* note 72, at 168.

Gény proposes free scientific research as an interpretive and creative method that should be deployed by the judge on those occasions when gaps in legislation have not been filled by custom.⁹² In such cases:

[T]he jurisconsult will have no choice but to scrutinize directly the nature of things, and to question the social elements himself, from which he must fix the rule. . . . Above all, he will have to measure these objects [of investigation] like a legislator, determining their true nature and the laws that harmonize them, keeping his eyes fixed on the ideal of justice or social utility that must, before all else, be satisfied.⁹³

According to Gény, therefore, the task of the judge in such cases parallels that of the legislator.⁹⁴ The primary difference is that the judge must utilize a method designed to “free himself, as much as possible, from all personal influences,” whereas the legislator’s will knows no limits. Gény’s proposed judicial method, free scientific research, seeks to base judicial decisions on “objective elements” identified in “the nature of things,”⁹⁵ which science alone can reveal.⁹⁶ The judge discerns these objective elements and the rules of their “harmony” by drawing upon the social sciences, especially sociology, psychology, political economics, and history (including the history of ideas).⁹⁷ “[T]he sciences,” writes Gény, “shed light on the goal of life and the means to attain it.”⁹⁸ Individual judicial decisions, armed with this knowledge, would merely seek to attain these practical goals: “[I]n each particular case, it would only take . . . research into the goal to extricate, from the goal itself, the rule for the solution.”⁹⁹ French *doctrine* has come to accept free scientific research as a legitimate judicial practice. As Carbonnier explains, if “the preexisting legal order” does not furnish “an adequate legal rule for the case,”¹⁰⁰ then the judge may “forge” a rule “as if he were acting as a legislator.”¹⁰¹

A second theory in favor of the creative power of the civil judge, advanced most notably by Carbonnier, claims that the judge plays an important equity

92. Gény notes that only “sometimes the written law will be filled in and specified by custom” 2 GÉNY, *supra* note 4, at 222 (emphasis added).

93. 2 *id.* at 222–23.

94. 2 *id.* at 223.

95. 2 *id.* at 82.

96. 2 *id.* at 78 (footnotes omitted).

97. 2 *id.* at 137–40, 142, 144.

98. 2 *id.* at 144.

99. 2 *id.* at 90 (footnote omitted).

100. 1 CARBONNIER, *supra* note 76, at 33.

101. 1 *id.* at 33–34. Carbonnier explicitly identifies this practice as “free scientific research.” *Id.*, cf BELAID, *supra* note 86, at 278 (“[E]very time a judge gives a precise meaning to a statute, he performs a creative activity as important as that of the legislator who wrote the statute”); GÉRARD TIMSIT, *LES FIGURES DU JUGEMENT* (1993).

function in the legal system.¹⁰² To Carbonnier, equity means "law freed of rules, law that seeks a particular solution for each case, or better still, law that seeks an individual solution for each person."¹⁰³ An equity judgment is thus "a pure judgment that does not believe itself capable of becoming a rule."¹⁰⁴ Such a judgment is "the solution to a litigation, the appeasement of a conflict: to make peace rule between men is the supreme end of law."¹⁰⁵ Carbonnier explains that judges will exercise such equity powers even when the existing legal rules do not grant them such power. Why? "Because the judge is a man and not a syllogism machine: he judges by his intuition and his sensitivity as much as he does by his knowledge of [legal] rules and by his logic."¹⁰⁶ Carbonnier recognizes that it is difficult for French judges to rule overtly in equity, however justified they may be in doing so. Fortunately, they "know how to cloak [their equity judgments] in a legal form" by declaring the equitable solution to be the one syllogistically determined by statutory law.¹⁰⁷

A final theory in favor of the creative power of the civil judge has been most visibly championed by Tunc. This theory, which has its roots in free scientific research, posits that the French judiciary, and especially the Cour de cassation, must play an important role in the modernization of the law, in its adaptation to the evolving needs produced by "the complex and ever-changing movement of social life."¹⁰⁸ Tunc states:

What seems clear to me is that, regarding this delicate task of modernization of the law, there is room for action by both the legislator and the judge, and that in fact, the tribunals and the Cour de cassation accept to participate in this mission of modernization of the law.¹⁰⁹

As this statement demonstrates, the Cour is already understood to be performing this task deliberately. Furthermore, argues Tunc, the Cour should modify its procedure in order to maximize this modernizing role. Tunc suggests that a drastic reduction of its caseload would permit the Cour to

102. Cf. BELAID, *supra* note 86, at 336-38 (in applying his "sense of equity," French judge "humaniz[es] the rules of the positive law" on basis of fluid mandates of Natural Law).

103. 1 CARBONNIER, *supra* note 76, at 34.

104. *Id.*

105. *Id.*; see BELAID, *supra* note 86, at 284 (asserting that primary role of judge is "peaceful settling of conflicts").

106. 1 CARBONNIER, *supra* note 76, at 18.

107. 1 *id.* at 18-19.

108. 1 GÉNY, *supra* note 4, at 195. Tunc argues that the Cour must fill the existing gaps in the law and . . . fill the future gaps in the law, that is to say, adapt it to the needs and to the very aspirations of contemporary society. Such is, unquestionably, the highest function of the Cour de cassation. It is questionable in terms of its constitutional basis, but it is unquestionable in practice.

Tunc, *supra* note 72, at 159; see also BELAID, *supra* note 86, at 303 (arguing that creative role of judges promotes continuity, evolution, and progress in French legal system).

109. Tunc, *supra* note 72, at 160.

render more carefully considered decisions on the basis of such elements as the spirit of the legislation in question, the existing *jurisprudence* on the issue, the various theories proposed by academic *doctrine*, and the "social consequences" of "a decision in one direction or the other."¹¹⁰ Tunc's underlying belief is that the Cour "must in effect examine not a case, but a [legal] problem raised on the occasion of a case."¹¹¹ Additionally, the Cour should alter the cryptic and hermetic form of its syllogistic decisions.¹¹² Tunc states: "It seems obvious to me that explicit motivation [of judicial decisions] would produce the clarity necessary for framing questions in a way that facilitates progress, dialogue with *doctrine*, and opening toward social reality."¹¹³ As a first step, Tunc proposes dropping the traditionally "collegial" (univocal) judicial decision. Such collegial decisions are "farther from reality," often "imposing judicial compromises" that are "less clear" and "a source of ambiguity." They make it unnecessary for French judges to present "solid argumentation." And perhaps worst of all, they "do not open the door to an internal critique favorable to progress," but instead suppress dissenting opinions that might contain valuable "avant-garde ideas."¹¹⁴

As the work of GénY, Carbonnier, and Tunc demonstrates, French *doctrine* not only accepts the fact that the civil judiciary plays an important role in the creation and development of legal norms, but also offers theories to justify the judicial exercise of that role. The question nonetheless remains, to frame the issue in traditional French terms, whether *jurisprudence* constitutes a "formal source of law." Does the judge who fills in legislative gaps create law? What is the normative force of a long, unbroken line of judicial precedents? In response to such questions, GénY advances his famous theory of the role and status of *jurisprudence* in the French legal system:

110. *Id.* at 159–60.

111. *Id.* at 160.

112. In Tunc's words:

Where does the legal principle that the Cour announces in the major [premise] of its syllogism come from? If it is a legislative text, it is surprising that the issue has reached the Cour de cassation. Normally, the Cour posits or repeats a principle of *jurisprudence* of its own creation.

Why had it posited this principle? One has no idea. Sometimes [the Cour] engages in the overturning of *jurisprudence*. It affirms the contrary of what it had theretofore affirmed. Why? One isn't any more in the know, or in any case, the Cour does not explain it to any greater extent. And sometimes, the maintenance of a principle camouflages a change in how it is applied. That is an unavowed overturning.

Id. at 165.

113. *Id.* at 166. Compare GénY's claim:

By substituting notions that are technical, abstract, cold, and devoid of fertile reality for the truly substantial elements of the life of the law, that is, the moral, psychological, economic, political, and social motives that animate the legal world, our interpretation has made itself a system constructed entirely of ready-made phrases and pure categories; and, combined with the excessive influence attributed to modern codification, this system has rendered scientific *jurisprudence* not only sterile, but often irreparably rebellious to progress.

1 GénY, *supra* note 4, at 149.

114. Tunc, *supra* note 72, at 168.

[I]f *jurisprudence* does not possess, in and of itself, the value of a formal source of law, it often contributes to the formation of such sources, and even constitutes, in actuality, an essential and indispensable element of those sources. . . .

Above all else, . . . *jurisprudence* is, for us, in the modern era, the only truly fertile—and in any case the most frequent—opportunity for legal custom, principally general custom. Indeed, once established on a given point, *jurisprudence*, because of its indisputable authority, at least in fact, . . . frequently plays a determinative role. . . . [When *jurisprudence* entrenches itself], it satisfies all the elements of a true legal custom, of which the *jurisprudence* represents the departure point and the essential determinant. . . . I do not see . . . how we can refuse to recognize in it a truly obligatory rule of law, as the issue of that formal source: custom.—But it is important to note: It is not that *jurisprudence* constitutes an independent source of law, any more than it constitutes a custom *sui generis*. It only emerges, under these hypotheses, as the *propulsion device* of custom, but a *propulsion device* so indispensable, and of such inevitable effects, in our social and political condition, that a transposition of ideas—or maybe only a linguistic simplification—would suffice to bring to it all the credit for the creation, of which it constitutes, in fact, the cardinal instrument. . . .

That is how *jurisprudence*, as the initiator of custom, can, in my opinion, still to this day, be thought of as a force truly productive of law.¹¹⁵

In Gény's scheme, judicial precedents do not qualify as an independent source of law. Precedents merely have "authority" (an expression that Gény hardly defines in the clearest of terms), which can contribute to the creation of custom.

Gény's classification of *jurisprudence* as mere "authority," and his refusal to accord it the exalted status of a "source of the law," continues to be the predominant position of French *doctrine*.¹¹⁶ Thus Carbonnier, while he defines *jurisprudence* as "the solution generally given by the courts to a question of law"¹¹⁷ or as the "*habitus* of the courts,"¹¹⁸ and while he believes that it is formed out of "what is most abstract [in judgments], having general value for other possible cases,"¹¹⁹ flatly states that "*jurisprudence* is not a source of law. It is but an opinion that tends to become law. It possesses, as such, a certain authority, but more or less depending on the circumstances."¹²⁰ The key is that *jurisprudence* does not "directly" yield

115. 2 GÉNY, *supra* note 4, at 50–52.

116. *But see, e.g.*, BELAID, *supra* note 86, at 67, 296–301 (arguing that *jurisprudence* is part of positive law, in strictest sense of term).

117. 1 CARBONNIER, *supra* note 76, at 242.

118. 1 *id.* at 243.

119. *Id.*

120. 1 *id.* at 244.

"obligatory legal rules." Thus, "one can conjecture that, in the future, a court, confronted with the same [legal] question, will judge it in the same fashion: it is not obliged—legally—to do so, but it is a probability."¹²¹ As Carbonnier states, *jurisprudence* is an authority "*de facto* and not *de jure*, moral and not juridical."¹²² The reasoning is simple: Although the courts may, *in fact*, almost always follow their *jurisprudence*, they are not legally required to do so.

3. *The Resulting Tension*

"Modern" mainstream French academics agree that the traditional image of the passive French judge, mechanically applying legal provisions through the judicial syllogism's deductive method, can no longer be maintained. They believe that the French legal codes do not constitute a perfect generative grammar; and they challenge the traditional French myth of total legislative coverage. Since Gény, it has been generally conceded that the Code must contain gaps that cannot be filled by the merely mechanical extension of existing legislation. Instead, the judge can rectify these failures of the legal code only by drawing upon sources extrinsic to the Code.

As Carbonnier states, Gény's proposed method of "free scientific research" has become contemporary French academic *doctrine's* primary means of introducing elements external to the Code. But what are the external elements that are added to the grammatical orientation of the French judicial system? Contemporary French legal academics tend to answer that "modern" academic *doctrine* adds "social reality" to the mix of judicial concerns. A satisfactory answer, however, is more complex.

"Modern" French *doctrine*, which perceives failures in the grammar of the Code, and which accepts the creative normative role of the French judiciary, adds the need to produce theories of adjudication that can explain and justify why the judge should interpret the Code—or creatively fill gaps in the Code—in one way or another. French *doctrine* has attempted to produce such theories. Different academics have offered somewhat different theories, but all

121. 1 *id.* at 243.

122. 1 *id.* at 242. As Gény explains, the judge, faced with a firm line of precedent, can merely follow it without further investigation, should rule according to it when unsure of the proper course to take, and must set it aside only for truly decisive reasons. 2 GÉNY, *supra* note 4, at 49 (footnote omitted).

[J]udicial precedents, especially when they form a constant series of uniform decisions constituting a bloc in a determinate direction, must possess, in the mind of the interpreter, considerable authority.—By this I mean not only that they will exercise over him a moral and practical ascendancy, but furthermore, they will impose on his judgment a force of conviction

Id. Carbonnier offers another typical explanation. He stresses that the filling of legislative gaps through *jurisprudence* does consist of the creation of rules, even if judges may not constitutionally apply such rules in other cases. His reasoning, Kantian in tone, is that such a judicial rule, "within the case, has the value of a universal maxim." 1 CARBONNIER, *supra* note 76, at 34. This explains why judges will later tend to resolve similar cases according to the same criteria.

of their efforts are structurally similar. In each case, judicial interpretation is placed in the context of some overarching sociopolitical theory. GénY and Carbonnier, for instance, adopt more or less sociological theories of adjudication, viewing the role of the judge as that of realizing "objective equity by combining the idea of justice with that of the greatest social utility," or "settling conflicts," or "making peace rule among men."¹²³ Such conceptions of the role of the judge are understood to carry certain basic directives: The judge must be an agent of legal progress, he must modernize the law, he must clarify the law, etc. The judicial implementation of these directives is itself to be guided by certain policies, such as maximizing utility, maintaining stability and continuity, or promoting coherence.

In short, modern French academic theories of adjudication all understand the role of the judge to be goal-oriented.¹²⁴ Gone is the image of the judge who mechanically applies the provisions of an all-encompassing and all-generating legislative code. The judge exercises a role that has sociopolitical meaning and purpose. If the legislative code fails to do justice to this role, then the judge not only can, but *must* creatively supplement the Code. It is not that modern French legal theory has rendered the Civil Code irrelevant. Rather, it has placed the Code in the context of a larger hermeneutic: the purposive role of adjudication and of judges in the French sociopolitical system. The judicial role consists of interpretation not only of the Code, and not only of the social needs and values of the day, but also of the very purpose of adjudication. In contemporary French legal scholarship, judging acquires meaning and purpose not through the all-embracing grammar of the Code, but through the logic of sociopolitical theories external to the Code. The task of the French civil judge has come to be perceived as purposive: It should be guided and directed by the policies associated with the various metatheories. As things now stand in mainstream French legal theory, if the judge must be "creative" in order to fulfill his purposive and policy-oriented role, then so be it.

It would be a mistake, however, to overestimate the extent to which, in modern French academic *doctrine's* conception of the judicial role, the grammar of the Code has been supplanted by the logic of policy orientation. GénY proposed only that the judge engage in "free scientific research"—guided by "the idea of justice" and "the greatest social utility"—in those cases where existing legislation did not resolve a conflict, i.e., when the judge was confronted by a legislative gap.¹²⁵ He never truly doubted or questioned whether the judge was bound by the express provisions of statutory law; he simply insisted that the grammar of the Code could not generate judicial

123. See 1 CARBONNIER, *supra* note 76, at 341; 1 GÉNY, *supra* note 4, at 145.

124. See *supra* text accompanying note 99.

125. See *supra* note 92 and accompanying text. GénY actually goes significantly further: Free scientific research only comes into play in the absence of explicitly controlling legislative or customary rules. 2 GÉNY, *supra* note 4, at 222.

responses in those cases whose facts were beyond the purview of existing Code provisions. Carbonnier, in his *Droit civil*, presents Gény's understanding as the "current conception" of the judicial role. Even Tunc, who argues so forcefully that the Cour de cassation should make explicit the policy decisions that actually motivate its decisions, implies that most cases are covered by legislative provisions. He doubts that cases governed by a legislative text would tend to work their way up to the Cour de cassation.¹²⁶ On the one hand, this means that the Cour's cases involve judicially created principles. On the other, this suggests that the traditional grammar readily disposes of the majority of cases actually covered by a legislative text.

Mainstream French academics do recognize the interpretive latitude of the judge who faces *existing* Code provisions, but they do not make clear to what extent they believe such interpretive latitude exists, nor do they draw explicit conclusions about its implications. Carbonnier, for example, explains that judges can and do render equity judgments not only when they fill gaps in existing legislation, but also when they choose "between two interpretations of statutory law."¹²⁷ But how often do judges face such an interpretive choice? What conclusion is to be drawn from Carbonnier's Realist-inspired observation that, "quite often," judges operate the judicial syllogism in reverse, "positing the concrete decision that strikes them as humanly desirable, and then endeavor[ing] to work back to a legal rule"?¹²⁸ What does such interpretive practice imply about the judicial role? Such questions are not discussed. These authors take it for granted that the traditional form of the French judicial decision masks the exercising of judicial creativity, but they are unwilling to draw explicit conclusions concerning the theoretical tenability of a code-based legal system.

The result is the academic production of an uneasy compromise between the traditional French portrait of the judicial role and the sweeping conclusions that might be drawn from the criticisms that modern French academics have leveled against that portrait. This important compromise, suggested by modern academics' unwillingness to address judicial creativity other than in the context of perceived failures or gaps in the Code, manifests itself in French legal theory's endless preoccupation with the "sources of the law." Given modern French theory's acceptance of the creative role played by judges (even if only when the facts of a case reveal gaps in the Code), the issue then becomes what *status* to accord such judicial creation. The issue is of enormous importance to the French because the notion of judicial creativity runs so completely counter to the official portrait of the passive civil judge. The debate over the sources of the law enables French legal academics to defuse the drastic

126. See *supra* note 112.

127. 1 CARBONNIER, *supra* note 76, at 35–36.

128. See Carbonnier's reference to Judge Hutcheson, *supra* note 88.

conclusions that might be drawn from their own critiques. It allows them to note and justify the judicial creation of normative rules, while permitting them to deny such judicial creations the formal status of Law (which, according to the traditional French conception, can only be of legislative origin).

The debate over the sources of the law therefore functions as a conceptual device for raising certain interpretive problems without threatening the fundamental bases of the French politico-legal structure. The debate represents modern French academia's resort to a formal distinction that permits the perpetuation of the traditional claim of absolute legislative supremacy. The formal distinction is between "fact" and "law": All right, argues the academic, French judges do in fact create normative rules.¹²⁹ Judges must create such norms, especially when a case demonstrates the existence of a legislative gap. But that does not mean that such judicial norms constitute Law. Only the Legislature can create Law, as Article 5 of the Civil Code and the Law on Judicial Organization make abundantly clear. Of course, the argument goes, such judicial norms may in fact operate more or less as if they *were* Law, and they may in fact *become* Law in one way or another, but that does not mean that they *are* Law in and of themselves. In short, *jurisprudence* is not a real source of the law. This account explains and justifies why the French judiciary creates legal norms, and it permits the introduction of sociopolitical theories that suggest how the judge should exercise this creative power. But at the same time, it avoids challenging the notion of complete legislative supremacy. The debate over the sources of the law, combined with the ritual distinction between fact and law, therefore salvages as much as possible of the traditional French conception of the codified legal system.

Modern, mainstream French academic *doctrine* therefore contains, and seeks to maintain, a fundamental tension. French *doctrine* tends to understand the tension as existing between the legal code and changing social realities.¹³⁰ I propose that the tension be understood in interpretive terms: The tension is between grammatical and hermeneutic conceptions of adjudication, that is, between the grammatical conception that gives priority to the Code's ability to generate required legal outcomes and the hermeneutic conception that gives priority to a sociopolitical theory's ability to produce meaningful legal solutions. The tension between these two interpretive approaches yields a tension between one mode of discourse that centers on the text of the Code, and another that stresses the policy goals to be achieved.

By focusing on the tension between formal grammar and policy hermeneutics, one can begin to understand the importance, to the entire French civil judicial system, of the concept of the sources of the law. The concept

129. This proposition has become so mundane in French academic theory that it is known simply as "the fact of *jurisprudence*." See, e.g., BELAID, *supra* note 86, at 65-66.

130. See André-Jean Arnaud, *Le médium et le savant: signification politique de l'interprétation juridique*, in L'INTERPRÉTATION DANS LE DROIT 165, 166 (1972).

mediates between, on the one hand, the grammatical discourse of the official French portrait of the judicial role, and, on the other, the hermeneutic discourse of the unofficial portrait. It facilitates and justifies the simultaneous existence of two distinct discursive spheres (the official and the unofficial) in which two modes of reading are brought to the fore, and in which two portraits of judging are maintained.

B. *The French Magistrat's Unofficial Discourse*

As the previous Section demonstrates, modern French *doctrine* offers a very different image of the judicial role—both as it is and as it should be exercised—than that implicit in the official portrait. In French *doctrine*, the resulting tension, which is between grammatical and hermeneutic modes of reading, plays itself out in (or is maintained by) such concepts as the sources of the law. As mainstream academic theory both reflects and informs legal and judicial practice, the unofficial portrait (and the resulting tension its existence produces) should manifest itself somewhere within the judicial system itself. It does manifest itself, but in a discursive sphere *internal* to the French judicial system, in which *magistrats* present arguments to their brethren about how the cases before them should be decided. This Section therefore explores the unofficial portrait of the judicial role, as it is reflected in the argumentation of judicial *magistrats*.

1. *The Advocate General and the Reporting Judge*

The advocates general are a corps of *magistrats* who argue before the civil law courts in an *amicus curiae* capacity. They constitute a branch of the *ministère public*, a ministry that, under the ancien régime, acted as the agent of the crown before the courts; the ministry argued the interests of the King and, in later years, the interests of society as well.¹³¹ At present, though nominally a part of the executive branch,¹³² the ministry has retained only the latter function, slightly modified: It argues on behalf of the public welfare, society's interest, and the proper application of the law.¹³³ At least one of its members is attached to almost every major court in the French judicial system. In civil trials, a member of the *ministère* sits on the high bench with the

131. PERROT, *supra* note 48, at 259; see The Law on Judicial Organization, *supra* note 39, art. 1 ("The officers of the *ministère public* are agents of the executive power before the courts. Their functions consist of insuring the observance, in the judgments to be rendered, of the laws that concern the public welfare, and to insure the execution of the judgments rendered."); see also C. ORG. JUD. art. L. 751-2 (current judicial Code) ("In civil matters, the *ministère public* . . . oversees the execution of statutory laws, rulings, and judgments. He pursues such execution *ex officio* in dispositions that concern the public welfare").

132. The advocate general does not act or argue on behalf of the State or of the executive. He does, however, ensure the execution of judicial judgments. See C. ORG. JUD. art. L. 751-2.

133. PERROT, *supra* note 48, at 260.

members of the court, and presents her arguments, in a document known as her *conclusions*,¹³⁴ after the parties to the litigation have argued their respective positions.¹³⁵ Structurally, therefore, the *ministère public* occupies a privileged, intermediate position between the parties and the court.

Institutionally and professionally, the advocates general are truly the judiciary's brethren. Advocates general and members of the judiciary are both classified as *magistrats*: The former are floor *magistrats*, the latter sitting *magistrats*. They receive their education and training in the same school, L'École Nationale de la Magistrature.¹³⁶ As members of the same *magistrature* corps, those *magistrats* assigned to the bench can transfer to the floor, and vice versa.¹³⁷

The discourse of the advocates general offers valuable insight into the French judicial system's institutional self-understanding. Legal argumentation intended to persuade judges must conform to certain norms. The argumentative discourse carries an implicit conception of what is relevant to judicial decision making, and thus, of the proper role of the French judge. At the same time, the discourse of the advocates general emanates from members of the *magistrature* itself. As such, it reflects the *magistrature*'s own conception of the judicial role.

Equally probative is the discourse of the "reporting judge." One judge on every case before a French appellate court panel, and one Justice on every case before the Cour de cassation, is designated the reporting judge. The reporting judge's original function, developed in the fourteenth century, consisted of sifting through case documents and evidence brought to Paris from provincial courts for full-scale appellate review before the Parlement. He would work through the mass of evidence and would propose a judicial solution to the other members of the Parlement.¹³⁸ At present, the reporting justice serves a similar function for the Cour de cassation. He reviews the lower court records, formulates and researches the legal issues, and suggests to the rest of the Cour how to resolve the case. Like other members of the Cour, the

134. Whenever I refer to a particular *conclusions*, I shall treat it as a singular noun. This will avoid confusion when I later refer to several *conclusions* at a time, or when I refer to *conclusions* in general (in which case I will treat the noun as a plural).

135. PERROT, *supra* note 48, at 269. The member of the *ministère* does not take part in the deliberations or judgment of the court. C. ORG. JUD. art. R. 751-1.

Until recently, the *ministère public* was required to attend most trials and to submit to the court his position on the proper outcome of the litigation. In most cases, the *ministère*'s attendance and argument were fictitious; the *ministère* would symbolize its presence by leaving one of its wigs on the lectern, and would simply state that it left the resolution of the case to the wisdom of the court. At present, the participation of the *ministère public* is mostly optional, except at the Cour de cassation level. For a concise account of the composition and attributions of the public ministry, see generally PERROT, *supra* note 48, at 269-90.

136. PERROT, *supra* note 48, at 264, 310.

137. *Id.* at 264-65.

138. See DAWSON, *supra* note 2, at 277; PAUL GUILHIERMOZ, *ENQUÊTES ET PROCÈS* 157-63 (Paris, Durand 1892).

reporting judge takes part in the judicial deliberations and voting.¹³⁹ His findings and proposed resolution are known as his *rapport*.

Due to their inaccessibility, *conclusions* and *rapports* have never been presented or analyzed in any significant sense. The result has been a skewed understanding of how the French judicial system actually operates.

2. *The Inaccessibility of Conclusions and Rapports*

Unlike the formal decisions of the French courts, both the *conclusions* and *rapports* represent documents internal to the French judicial system. Even those produced at the Cour de cassation are rarely published. For example, the Recueil Dalloz, the French equivalent of West Reports, publishes on average a mere four to six *conclusions* and only one or two *rapports* per year, despite the fact that a *conclusion* and a *rapport* are produced in preparation of every Cour de cassation decision.¹⁴⁰ Furthermore, gaining access to unpublished *conclusions* and *rapports* is exceptionally difficult, even for an academic engaged in general research.¹⁴¹ The *rapports*, in particular, are considered to be highly personal documents. They are regarded as the property of their authors, and it is customary for the reporting justice to take back, physically, certain sections of his *rapport* from the Cour's dossier once the case has been decided.¹⁴² As a practical matter, even once one has access to the Cour's closed dossiers it is essential that the case in question be recent enough that the repossession of the *rapport* has not yet taken place, or that its author has not bothered to repossession it. The *rapports* may also be protected by the secrecy of judicial deliberations, and therefore protected by law as a part of the judicial system's internal workings, which are not open to the public.¹⁴³ The *conclusions* of the advocate general, on the other hand, are—nominally, at least—public documents. As a practical matter, however, they are not significantly more accessible than the *rapports*. They linger in the Cour's dossiers; access to them therefore requires quite a chain of letters of introduction.

139. The reporting judge's name is listed in small print at the end of the court's decision, along with the names of the senior judge and the advocate general.

140. The Cour's *Annual Report*, which details the Cour's activity over the previous year, publishes another two or three of the year's important *conclusions*, and usually publishes one more *rapport*. See, e.g., 1992 ANN. REP. (1993). By all indications, the *Bulletin officiel des arrêts de la Chambre civile de la Cour de cassation* (the Cour's official reporter) publishes none at all.

141. Successfully gaining access provided a few more examples of *conclusions* and *rapports*, but more important, provided certain insights into the internal interpretive practice of the French judiciary.

142. Interview with Pascal Chauvin, Secrétaire Général de la Première Présidence de la Cour de cassation, in Paris, France (Dec. 13, 1993).

143. Article 448 of the New Civil Procedure Code (Nouveau Code de Procédure Civile [N.C. PR. CIV.]) provides simply that "the deliberations of the judges are secret." Some *magistrats* claim that Article 448 applies to the *rapports*, others not. The occasion has apparently never arisen to settle the issue in court.

3. *Two Introductory Examples: A Conclusions and a Rapport*

This Subsection presents, and briefly analyzes, a *conclusions* of an advocate general and a *rapport* of a reporting judge. These examples, which show how French *magistrats* debate legal issues in their internal discursive sphere, demonstrate that the French judiciary operates under a different understanding of the judicial role than that implicit in the official portrait. As will become readily apparent, these examples require a new account of how the French legal and judicial systems actually function.

a. *The Conclusions of an Advocate General*

The following typical example presents arguments by an advocate general before a chamber of the Cour de cassation. The case involves a plaintiff who was injured in a moped accident. Defendant's insurance company reached a settlement with plaintiff. Subsequently, however, plaintiff required surgery with costs exceeding the settlement. The lower courts rescinded the original settlement on the grounds that (a) the accident was the cause of the surgery, and (b) the need for the surgery was not foreseeable at the time of the settlement. The insurance company appealed. As the following translation demonstrates, Advocate General Lindon's *conclusions* evinces a different understanding of the judicial role than that posited by the official portrait of the French civil judge.

The case that is submitted to you poses the problem of the scope and limits of settlements between accident victims and insurance companies.

[Lindon recounts the facts and the lower court decisions.]

According to this decision [of the appellate court], which, as I will later show, does nothing other than rely on the most recent *jurisprudence*, one must distinguish between, on the one hand, mistake as to the gravity, the aggravation of a harm known at the time of the settlement and whose severity would have been underestimated by the victim, and on the other, mistake as to the object, the appearance of complications normally unforeseeable at the time of the settlement.

I would first like to explain myself on the first aspect of the principles thus posed.

As you know, insurance companies require, at the time of a settlement, the signing of releases whose terms include in a very clear fashion all the future consequences of the accident. From that point forward, taking present legislation into account, one may not, legally, put into question a settlement on the grounds that the damage known at the time of the settlement, and which this settlement had as its object to repair, has worsened. Otherwise one would open the door to the rescission of all settlements.

But I believe that because of the particular nature of corporeal damage, the strict observation of this rule leads to results that, from the point of view of humanity, from the point of view of equity, are extremely shocking.

Here are some examples.

[Lindon refers to a past decision rendered by the same chamber of the Cour de cassation and proposes two hypothetical cases in order to demonstrate that accident victims (e.g., poor children) might be better off refusing to settle with insurance companies lest they find themselves barred from receiving payment for the treatment of injuries unforeseen at the time of the settlement, which would of course leave the children financially incapable of receiving any treatment at all in the meantime.] And thus, in the current state of the law in the matter, parents are compelled to submit the health of their child to the fate of a bet! Do I not have the right to use the epithet "shocking" to describe such results?

[Lindon reminds the members of the Cour that, as he has often informed them before, judicial awards to accident victims are open to later revision in favor of the victim.] Many decisions have been rendered in this direction, and one finds several cited by MM. Mazeaud, in their *Traité de la responsabilité*.

. . . .

[Lindon then points out that labor law and social security law each allow damages awarded the victims of work-related accidents to be revised, referring to numerous judicial cases along the way. He also discusses the problem of increasing use of the courts as a means to revise damage awards.]

. . . [T]he principle itself was not self-evident;^[144]

One must therefore find an explanation for the new legislation regarding revision in cases of work-related accidents and for the *jurisprudence* just mentioned. One exists, and I do not pretend to have discovered it because, to tell the truth, it was discerned by the case commentator who signed, under the name of F.M., the comment published in the *Dalloz* on a decision of the Cour de cassation of December 1, 1942. It is the idea of reparation when it applies to a violation of physical integrity.^[145]

You know that contractual waiver clauses are not considered valid when it is a question of such violations. . . . And one can very well imagine that, consciously or not, the legislator and the judge were inspired by this idea Why does this same idea not prevail in the case of a settlement? Well, it is apparently because it runs up against the general rules governing settlements, which must have an inclusive and definitive character.

I am therefore led to conclude that if the *jurisprudence* that disallows rescission after settlement for aggravation of the damage

144. Lindon is expressing qualms about the revision of judicial damage awards, noting the apparent contradiction with the doctrine of *res judicata*. See *supra* text accompanying notes 61–63.

145. The violation of physical integrity refers to corporeal injury.

that the settlement sought to repair is legally and technically justified, it nonetheless constitutes a stain on the totality of our positive law.

And this conclusion leads to another, namely, that the best solution would be legislative.

It would certainly not be impossible for the courts to make an exception to the applicable rules on settlements when they are faced with a violation of physical integrity. . . . And in this respect, we have a precedent that fits the bill

But, Sirs, it is not for you to make the statutory laws. Your domain is *jurisprudence*. Well, to come back to today's case, it is neither an upheaval, nor even a softening of *jurisprudence* that I invite you to produce, because the debate is situated not on the level of rescission for mistake as to the gravity of the injury, but on that of mistake as to the object of the settlement.

In short, what the appellant insurance company invites you to say is that in matters of settlements entered into after corporeal accidents, that once they are composed, there can never be a mistake as to the object

But this thesis does not agree with that of certain decisions that you have recently rendered.

Here, first of all, is a decision of July 9, 1963

Might this decision not have served as a model for the decision challenged before you today?

More recently, on October 29, 1963, your Chamber judged

And conversely, on February 22, 1965, you judged

Well, Sirs, the decision challenged before you today fits altogether in the line of the decisions that I have just cited.

Without it even being a question of overturning your *jurisprudence* regarding the aggravation of corporeal injury, although I hope that you will do so on the first possible occasion, this is only about maintaining and consolidating your *jurisprudence* regarding mistake as to the object.

I ask you to do so and conclude in favor of rejecting the appeal.¹⁴⁶

Lindon, a high-ranking *magistrat*, presents two different lines of argument that assume that the Justices of the Cour play an active role in the development and application of legal norms. The first frames the case in terms of a possible—and desired—conflict between the Code and the Cour's *jurisprudence*. The relevant Code provision, Article 2053, permits the rescission of a settlement only if there has been a mistake as to its object. But "strict observation of this rule," argues Lindon, "leads to results that, from the

146. *Conclusions* of Advocate General Lindon, Judgment of March 8, 1966, Cass. civ. 1re, 1966 J.C.P. II, No. 14,664, at 1–3 (citations omitted). In pragmatic terms, to "reject the appeal" is to affirm the decision being appealed.

point of view of humanity, from the point of view of equity, are extremely shocking.”¹⁴⁷ The insurers argue in favor of precisely such a result. Lindon urges the Cour to create new *jurisprudence* that would permit rescission for a mistake relating to the gravity of the physical injuries covered by a settlement.

Lindon then presents his second line of argument. This particular case actually involves a mistake as to the object of the settlement: The injuries suffered by the victim were unforeseen and unforeseeable at the time of the settlement. Lindon thus assures the Cour that the case is “only about maintaining and consolidating [its] *jurisprudence* regarding mistake as to object.”¹⁴⁸ Because the appellate court’s decision follows the Cour’s previous decisions, it should be affirmed.

Lindon’s arguments present a portrait of the judicial role that is difficult to square with the official French portrait of the civil judge. Lindon clearly disapproves of Section 2053 of the Code. He posits that the Cour could and perhaps should, in the absence of legislative action, unilaterally establish an exception to the applicable Code provision. Lindon proposes that the Cour modify the apparent dictates of the Code by modifying its own *jurisprudence*. Although Lindon finds such judicial action unnecessary in the case at hand, he nonetheless urges that it be taken as soon as possible.¹⁴⁹ The implication is that the Cour’s *jurisprudence* possesses normative power in some way comparable to that of the Code. Judges and their *jurisprudence* can legitimately and intentionally modify legislative rules.¹⁵⁰ For example, Lindon states: “[Even] if the *jurisprudence* that disallows rescission after settlement for aggravation of [injuries] is legally and technically justified, it nonetheless constitutes a stain on the totality of our positive law.”¹⁵¹ Lindon understands *jurisprudence* as constituting part of France’s positive law. He portrays the French legislator and judge as operating in the same sphere. Thus, contractual clauses denying liability for tortious physical injuries are considered invalid because, “consciously or not, the legislator *and the judge* were inspired by this [same] idea.”¹⁵²

Although Lindon’s first argument offers the more striking substantive claim for the normative power of the French judge, Lindon fashions a similar claim through his extensive use of precedent. Lindon refers to no fewer than nine cases, cites eight, quotes extensively from four, and even refers the

147. *Id.* at 1.

148. *Id.* at 3.

149. Lindon is not merely suggesting that the Cour adopt an alternative interpretation of the Code provision that would permit the rescission of certain settlements. He states that “taking present legislation into account, one may not, legally, put into question a settlement on the grounds that the damage was known at the time of the settlement.” *Id.* at 1. His proposal to the Cour requires the intentional modification of the applicable legislative rule. *See id.*

150. Given the language of Article 2053 of the Code, some might well argue that Lindon proposes a judicial rule that would intentionally eviscerate the legislative rule.

151. *Conclusions* of Lindon, *supra* note 146, at 2.

152. *Id.* at 2 (emphasis added).

Justices to an academic treatise that contains further judicial examples. At the same time, Lindon hardly mentions the applicable provisions of the Civil Code. Although he twice refers to Section 2053, he only does so when presenting the appellant insurer's losing argument. Furthermore, while he quotes the text of the judicial precedents, he only paraphrases the text of the relevant Code provisions.¹⁵³ Thus, the method as well as the substance of the argument empower case law over statutory authority.

The substantive thrust of Lindon's *conclusions* is based on the importance of the Cour's precedent. He argues not only that the affirmation of the appellate decision would not overturn or weaken established precedent, but that the appellate decision perfectly accords with that line of precedent. Lindon strongly suggests that the appellate decision was itself modeled upon the Cour's own decision in an earlier case. He therefore argues that the Cour should not overturn an appellate decision that clearly follows the Cour's own line of precedent.

By the end of Lindon's analysis, the force of precedent becomes the centerpiece of the *conclusions*. The concluding paragraph states that "this [case] is only about maintaining and consolidating your *jurisprudence* regarding mistake as to the object."¹⁵⁴ The statutory argument has completely disappeared. The normative power of judicial precedent, rather than that of the Code, drives the argument.

The difference in tone between Lindon's discourse and that of the paradigmatic French judicial decision is also worthy of note. Lindon argues in a conversational style. Not only does he begin several sentences with the familiar expression "*Et bien*" ("Well"), his arguments also reflect his personal experience before these very judges: "You know, Sirs, and I have often had the occasion to note it before you, that"¹⁵⁵ He does not shrink from speaking in the first person, nor from expressing his very personal opinion on legal matters.¹⁵⁶ His argumentative style, in contrast to that of the official French judicial opinion, fosters the impression that room exists for discussion. The matter open for discussion includes the choice of options available to the Justices in the disposition, not only of the particular case before them, but also of the entire class of cases to which this case belongs.

153. Articles 2052 and 2053 of the Civil Code state, in pertinent part:

Art. 2052. Settlements possess, for the parties involved, the authority of a matter adjudged without appeal.

They cannot be challenged on the basis of legal error or inadequacy of consideration.

Art. 2053. Nonetheless, a settlement may be rescinded when there has been a mistake as to the object contested.

C. CIV. arts. 2052-53.

154. *Conclusions* of Lindon, *supra* note 146, at 3.

155. *Id.* at 1.

156. *Id.* ("Do I not have the right to use the epithet 'shocking' to describe such results?").

Some of the substantive options suggested by Lindon, such as the judicial establishment of an exception to the applicable Code provision, are astonishing, as is the very mode of his argumentation. Lindon raises social policy concerns: In the name of "humanity" and "equity," the Cour should modify the rule that limits the rescission of settlements to circumstances involving a mistake as to the object of the settlement. Lindon seeks to correct the "shocking" results produced by the operation of the rule.

To advance this social policy argument, Lindon elaborates pragmatic principles drawn from recent legislative and judicial texts.¹⁵⁷ Relatively recent French legislation and judicial decisions in the area of social security, worker's compensation, and tort law stand for the principle that complete reparations are particularly important in cases involving physical injury. This principle, argues Lindon, should extend to cases arising under insurance settlements. The Cour should advance this principle, even without appropriate legislative action. It should therefore permit the rescission of settlements on the basis of the mere aggravation of physical injuries. Lindon's countervailing institutional policy concern is not that the judiciary might not be the proper branch of government to establish and to implement this principle and its corresponding social policy, but rather that allowing the judicial revision of settlements might increase court congestion.¹⁵⁸

Lindon's *conclusions* presents a portrait of the role of the French judge that differs dramatically from the official portrait. Most important, Lindon's arguments assume that judges play a crucial normative role in the development and application of legal rules. The judicial enterprise is not understood as the mechanical application of given legislative provisions, but rather as the purposive elaboration of pragmatic principles. This process of elaboration accords judicial precedents at least as much attention and authority as legislative enactments; and the *magistrat's* primary mode of analysis is policy discourse.

Nevertheless, advocates general are merely floor *magistrats*, not sitting judges; for an even closer view into the judiciary's internal discourse, one needs to look at the *rapports* of a reporting justice.¹⁵⁹

157. "One must therefore find an explanation for the new legislation regarding revision in cases of work-related accidents and for the *jurisprudence* just mentioned." *Id.* at 2.

158. Even Lindon's second argument is premised on policy concerns. He cautions that it would be bad institutional policy to overturn an appellate decision that was apparently modeled on one of the Cour's own recent precedents.

159. Throughout this Article, the term "judge" subsumes both judges on the lower courts and Justices on the Cour de cassation.

b. *The Rapport of a Reporting Justice*

An examination of a typical *rapport* demonstrates the similarities between the *conclusions* of an advocate general and the *rapport* of a Justice of the Cour de cassation. In a civil action for wrongful death, two plaintiffs—the victim's wife, Mrs. Braesch, and a Mrs. Bechler, age seventy-two—sought the usual money damages.¹⁶⁰ Mr. Braesch had apparently left his wife for Mrs. Bechler (also married) some thirty-five years prior to the accident, and they had lived together ever since. The trial court rejected Mrs. Bechler's claim on the grounds that a concubine could not sue for damages caused by the death of her lover. The appellate court, however, overturned the ruling and ordered Bertrand to "pay the said concubine an indemnity in reparation for her material and emotional damages."¹⁶¹ In his *rapport* to his brethren, Justice Combaldieu of the Cour de cassation argued as follows:

One is immediately tempted to conclude that solely the lower court judge is empowered to determine, beyond all control of the Cour de cassation, the existence and the extent of damages.

. . . .
 . . . But adultery and the maintenance of a concubine, or complicity therein, constitute a crime, thus an illicit act. How, in such conditions, could the concubine find in an illicit act the source of indemnification, of whatever nature it may be? . . . Who does not sense that such a result would run directly contrary to public welfare, which, if it tolerates concubinage, must ensure the protection of the institution of marriage? . . . Any other solution would constitute an encouragement given to adultery and to de facto bigamy. . . .

. . . [S]hould not plain common sense and the most elementary morality nevertheless place an insurmountable obstacle in the way of she who dares publicly, even before the courts themselves, to ridicule the institution of marriage and the legitimate family, to trample under foot the articles of the Civil Code on spousal rights and obligations by making herself the accomplice of the unfaithful spouse, and, pushing impudence to the extreme, to claim as a title, with the goal of gaining monetary profit, the adulterous relations that the law condemns?

. . . Let us add, on the level of equity, that by moving in with a married man, the concubine could not legitimately count on any legal protection. Better yet: all illegal situations can damage he or she who risks partaking in them; it is not up to him or her to make others bear this risk.

. . . .

160. *Rapport* of Justice Combaldieu, Judgment of Jan. 20, 1966, Cass. crim., 1966 D.S. Jur. 184. The defendant was found guilty of involuntary homicide.

161. *Id.* at 185.

It would, however, be well to consider, especially regarding the reparation for damage, that it is advisable to prevent multiple and concurrent suits, if one wishes to avoid ending up, as notes Professor Flour, with absurdities. . . . [W]ho would actually dare give preference to the concubine who has the audacity to rise beside the legitimate spouse in order to claim—as the ancients would say—the price of her debauchery? It would be advisable to consider that what is at issue here are two mutually exclusive and contradictory claims.

[Combaldieu then states that Mrs. Bechler cannot be permitted to collect damages for her lover's death and at the same time be capable of receiving damages should her own husband die: She would be in a better position than a legitimate spouse.]

That is why I believe, insofar as I am concerned, that the claim of the concubine must be vigorously rejected. The public welfare has, in fact, a direct stake in the protection of the institution of marriage, has it not?

* * *

The state of *jurisprudence* on the indemnification of the concubine's damages is too well known for it to be necessary to discuss it at length.

Schematically, three tendencies appear to manifest themselves at present within the Cour de cassation.

1.—*The Criminal Chamber* does not require a bond of kinship or marriage, a *simple factual certainty* of damages incurred being sufficient.

Besides, the decisions of the Criminal Chamber are nuanced in this respect: They do not say, as they are sometimes made to say, that, whatever the case may be, the concubine will obtain reparation. The Criminal Chamber recognizes that the simple rupture of the state of concubinage cannot alone justify the attribution of damages . . . but mostly, it arrogates the right to study in each case . . . the "quality," so to speak, of the concubinage: It only retains those that are stable and not precarious, and whose appearance resembles marriage.

. . . .

Let us recall here that social legislation and the *jurisprudence* on this issue have also recognized certain rights belonging to the concubine; let us mention, for the sake of refreshing our memory, that . . . [cites provisions of the Social Security Code and *jurisprudence* of the Cour].

2.—*The Second Civil Chamber* requires, insofar as it is concerned, that there be, according to the well-known formulation, a "violation of a legally protected, legitimate interest" The concubine therefore finds herself excluded, without any other distinctions.

3.—*Finally, the First Civil Chamber* has, in a decision noted by legal commentary . . . abandoned the necessity of a bond of kinship or marriage in order to attribute reparation for emotional damages

Whatever opinion one might have on the substance of the problem, based on the angle under which one observes it, it is

obviously regrettable that there be on this issue a divergence between the chambers, when the regulatory role of the supreme Cour is precisely to fix the unity of *jurisprudence* and to thus give firm rules to parties and to the lower courts. . . .

To identical problems are not given identical solutions, which has the effect of perplexing the parties and the lower courts . . . and to offer targets to the scathing arrows that a good portion of academic scholarship shoots at *jurisprudence*.

. . . [I]t appears, of course, that these divergences must not be irreducible, and some authors have even suggested the bases of a possible compromise; but these divergences undoubtedly can only be made to disappear by a decision of the United Chambers [of the Cour] or by a legislative intervention: but the setting into motion of one or the other does not depend on the judicial power.

. . . .

Thus, we think that the solution that we propose to the Criminal Chamber remains in the line of the decisions that it has previously rendered on the issue in the latest state of its *jurisprudence*: the mere existence of a marriage—and *a fortiori* the presence of the legitimate wife as a plaintiff for indemnification—must necessarily lead to closing the door of the court to the concubine; a cumulation or partition of damages is to be rejected.

One will object, perhaps, on the basis of the decisions of the other chambers that give satisfaction to the claim of the concubine; but concubinage does not in and of itself constitute a crime, as long as it is not accompanied by an adultery

One will also object, perhaps, on the basis of the decision . . . by which the criminal *jurisprudence*, to the great scandal of civilists, favorably received the civil action brought by a prostitute against her pimp; but prostitution, no more than concubinage, does not constitute in and of itself a crime.

. . . .

. . . The proposed solution appears to fit smoothly in the *jurisprudence* of the Criminal Chamber; at the very most, it may seem more reserved than a recent decision that the chamber rendered in the matter of checks written with insufficient funds . . . a decision whose boldness had provoked some reservations.

If one absolutely insists on giving it the connotation of a tendency, this solution appears to “hit the brakes” on the *jurisprudence* on the concubine.

But who would dare complain about this “braking”? Would not any other solution run the risk of being interpreted by the legitimate wife as a slap in the face?

And is it not fortunate that the taking of such a position—if you adopt it—might be considered as the laying of the first stone—a modest one, no doubt, but nonetheless not negligible—in the construction of a unified *jurisprudence* on the issue, so desired by all? Did Portalis^[162] not say:

162. Jean Portalis (1746–1807) was one of the main authors of the Civil Code.

"It would be great evil if there were contradictions in the maxims that govern men."¹⁶³

The tone of Justice Combaldieu's *rapport* is quite similar to that of Lindon's *conclusions*. Combaldieu argues as a single voice among many, presenting his personal opinion to the Cour. His recommendation is just that, a recommendation; it is not presented as the necessary grammatical response to a fact situation. He personally believes that the concubine's claim should be rejected.¹⁶⁴

Like Advocate General Lindon, Justice Combaldieu bases his recommendation on an analysis of judicial precedent. Not only is he aware of existing judicial decisions, but he assumes that his audience is similarly informed: "The state of the *jurisprudence* on the indemnification of the concubine's prejudice is too well known for it to be necessary to discuss it at length."¹⁶⁵ His method consists of mapping the various lines of judicial precedent produced by the Cour, and proposing a solution as consistent with them as possible.

In his analysis, Combaldieu cites eight specific decisions and identifies three lines of precedent that offer different approaches and solutions.¹⁶⁶ Of perhaps greater significance, Combaldieu quotes the key language from the three lines of decision, suggesting that French judges treat precedent as legal norms. The lines of precedent can be identified, distinguished, and encapsulated; for each court that has produced precedent, its language carries significant normative force. Combaldieu states, for instance, that "[t]he Criminal Chamber does not require a bond of kinship or marriage,"¹⁶⁷ while "the Second Civil Chamber requires that there be, according to the well-known formulation, 'the violation of a legally protected, legitimate interest.'"¹⁶⁸ Each of the courts overtly "requires" that the plaintiff demonstrate a particular kind of damage; each court has established its own normative rule.¹⁶⁹

Combaldieu's approach suggests that judicial precedent possesses something more than merely persuasive force.¹⁷⁰ But the normative power of the judicially constructed rules is not absolute: Combaldieu never states that the Criminal Chamber's *jurisprudence* must be followed.¹⁷¹ By presenting the

163. *Rapport* of Combaldieu, *supra* note 160, at 185-87.

164. *Id.* at 186 ("That is why I believe, insofar as I am concerned, that the claim of the concubine must be vigorously rejected.").

165. *Id.*

166. *Id.* ("Schematically, three tendencies appear to manifest themselves at present within the Cour de cassation.").

167. *Id.*

168. *Id.*

169. Cf. Interview with Raymond Exertier, Premier President of the Cour d'appel de Toulouse, in Toulouse, France (Feb. 3, 1994) ("I must maintain my *jurisprudence*").

170. See *Rapport* of Combaldieu, *supra* note 160, at 186 ("The 2nd Civil Chamber *requires* . . .") (emphasis added).

171. The case was tried before the Cour's criminal chamber.

jurisprudence of the other Chambers, he implies that the Criminal Chamber possesses significant latitude in the application of precedent. Nonetheless, Combaldieu's *rapport* makes sure to stress that "the solution that we propose to the Criminal Chamber remains in the line of decisions that it has previously rendered on this issue in the latest state of its *jurisprudence*."¹⁷²

Although Combaldieu's primary argument presents a solution consistent with the *jurisprudence* of the Criminal Chamber, Combaldieu strongly believes that the *jurisprudence* of the various chambers of the Cour de cassation should be unified.¹⁷³ While it is unclear whether the "giving of firm rules" is understood to mean the judicial creation of law or simply the production of a single interpretation of the statutory law, Combaldieu suggests that the Cour is capable of performing a normative function quite similar to that of the legislative branch.¹⁷⁴

Until such legislative or United Chambers action is taken, the Cour must produce a solution to the case at bar. The Code gives no clear answer to how the Cour should render its decision.¹⁷⁵ Combaldieu, sensitive to "the scathing arrows that a good portion of academic scholarship shoots at [the Cour's] *jurisprudence*,"¹⁷⁶ cites and quotes from no fewer than a half-dozen academic writers. His own argument, far from presenting the grammatical necessity of a given application of the Code, hinges on policy analysis.

Combaldieu presents social and institutional policy arguments under the headings of public welfare, morality, and equity. He first asks: "Who does not sense that such a result would run directly contrary to the public welfare, which, if it tolerates concubinage, must assure the protection of the institution of marriage?"¹⁷⁷ After discussing "plain common sense and the most elementary morality,"¹⁷⁸ Combaldieu turns to equity: "Let us add, on the level of equity, that by moving in with a married man, the concubine could not legitimately count on any legal protection."¹⁷⁹ Combaldieu then incorporates economic policy by suggesting that the concubine must assume the risk of her illicit behavior; she cannot ask a third party to bear or share the risk. Finally, Combaldieu is highly conscious of the Cour's decision as an institutional

172. *Rapport* of Combaldieu, *supra* note 160, at 186.

173. *Id.* ("[T]he regulatory role of the supreme Cour is precisely to fix the unity of *jurisprudence* and to give firm rules to parties and to the lower courts.").

174. *See id.* ("[T]hese divergences undoubtedly can only be made to disappear by a decision of the United Chambers [of the Cour] or by a legislative intervention."). The "United Chambers" ("*chambres réunies*," now known as "*Assemblée plénière*") consists of a composite panel of the Cour de cassation drawn from the ranks of the Cour's various chambers. Its primary role is to fix a point of law over which there is disagreement or conflict within the judiciary. *See* PERROT, *supra* note 48, at 200-01.

175. The only clearly applicable Code provision is Article 1382, upon which virtually all of French tort law is based. It states: "Any human action that causes damage to another obliges the one by whose fault it occurred to repair it."

176. *Rapport* of Combaldieu, *supra* note 160, at 186.

177. *Id.* at 185.

178. *Id.*

179. *Id.*

response to the issues raised by the case. He argues for the Cour's creation of a unified *jurisprudence*; if this is not feasible, he implicitly recommends that the Cour follow the Criminal Chamber's own line of precedent. As Combaldieu's concluding statements demonstrate, this new institutional response is overtly pragmatic, purposive, and forward-looking.¹⁸⁰ He calls upon his brethren to take a programmatic, normative stand based on assorted social, economic, and institutional policy considerations.

The unofficial discourse of judicial *magistrats* demonstrates that the French judge does not approach cases as perfectly individualized fact scenarios merely to be plugged into the grammatical matrix of the Code. The *conclusions* of the advocates general and the *rappports* of the reporting judges stress the perceived gaps, conflicts, ambiguities, and even insufficiencies of the Code. In these legal arguments, the judicial enterprise consists largely of pragmatic case analysis and policy discussion. The judiciary is aware of past decisions, understood to carry significant normative force, and feels considerable institutional pressure to respect precedent, while seeking to produce coherent responses to the issues raised by new cases.

C. *A Detailed Analysis of the French Judicial Magistrate's Unofficial Discourse*

In order to understand the complex relationship between the official and unofficial portraits of the French civil judge, it is necessary to perform a more detailed analysis of the *conclusions* and *rappports*.¹⁸¹ Given the dominant similarities between these two forms of judicial argumentation, I shall analyze them simultaneously.¹⁸²

1. *Constitutive Elements*

To one accustomed to French judicial decisions, the length of the *conclusions* and *rappports* is the first surprising characteristic of these documents. Cour de cassation decisions typically run a single typewritten page. The few *conclusions* and *rappports* published in the Recueil Dalloz, on the other hand, can be five times as long. Upon opening dossiers of the Cour de

180. This institutional response represents "taking a stand." Its tendency would be to act as a "brake" on the *jurisprudence* that favors concubines, and it would "happily" constitute the "first stone" in the creation of a "unified *jurisprudence*."

181. Given the scarcity of available examples, it is impossible to organize the analysis on the basis of subjects addressed by *doctrine*, or to follow the *rappports* produced in a line of Cour de cassation cases interpreting a given article of the Civil Code. The analysis therefore focuses on the common characteristics of the several dozen examples of *conclusions* and *rappports* that I have been able to gather, regardless of the substantive issues that they happen to address.

182. The *rappports* and *conclusions* do present, however, significant functional and stylistic differences, which I shall note whenever necessary.

cassation, however, one discovers that *conclusions* and *rappports* can routinely be fifty pages long; the *conclusions* and *rappports* published in the Recueil Dalloz, as it turns out, are heavily edited. The length of the unedited documents demonstrates that there is quite a bit more, so to speak, to the French judge's interpretive practice than official French judicial decisions would lead one to believe. Fifty-page syllogisms, after all, are rather difficult to envision.

The typical *conclusions* or *rapport* comprises a few basic elements, which are often labeled by section headings, or separated by typographical markers such as a line of asterisks, or distinguished by numbered paragraphs. The *conclusions* or *rapport* may also take the form of a single, unbroken text. The composition of these documents suggests a certain freedom from formal requirements. Substantively, however, most *conclusions* and *rappports* cover the same set of legal bases.

These documents typically begin with a presentation of the facts and procedural history of the case. The presentation of the facts, while more complete than what one finds in a French appellate court decision, nonetheless remains fairly terse by American standards; one or two paragraphs suffice,¹⁸³ although it is not unusual for a fact section to run as long as a page or two.¹⁸⁴ The presentation of the case's procedural history, often intertwined with the presentation of the facts, is more detailed. The case is tracked through the judicial system, and it is routine for the lower court rulings to be quoted at length.

After the presentation of the facts and procedural history, the *conclusions* or *rapport* proceeds to the legal analysis. This analysis consists of an examination of relevant French legislation, such as Civil Code provisions or other legislative enactments; judicial precedent; academic publications; and any appropriate foreign (usually European) legislative norms or judicial solutions. The *conclusions* or *rapport* may devote more or less of its space to one or another of these fundamental legal considerations, addressing them one after the other or simultaneously. It is also common for the *conclusions* or *rapport* to follow the organization of the appellant's brief, responding to its claims in the order in which they are presented.¹⁸⁵

While the *conclusions* or *rapport* may contain prefatory remarks on basic issues presented by the case (whether identified as legal, moral, philosophical,

183. See, e.g., *Conclusions* of Advocate General Joinet, Judgment of Feb. 2, 1990, 1990 Bull. Civ. I, No. 2, at 2, in 1990 ANN. REP. 147, 149 (1991); *Rapport* of Justice Massip, Judgment of Apr. 26, 1988, Cass. civ. 1re, 1988 D.S. Jur. 469; *Conclusions* of Advocate General Charbonnier, Judgment of Nov. 13, 1987, 1987 Bull. Civ. I, No. 5, at 11, in 1987 ANN. REP. 108, 108 (1988).

184. See, e.g., *Conclusions* of Advocate General Dorwling-Carter, Judgment of July 11, 1989, in 1989 ANN. REP. 85, 85-86, 86-87 (1991); unpublished *rappports* (on file with author).

185. See, e.g., *Rapport* of Justice Massip, Judgment of Dec. 13, 1989, Cass. civ. 1re, 1990 D.S. Jur. 273; *Rapport* of Justice Sargos, Judgment of Oct. 8, 1986, Cass. civ. 1re, 1986 D.S. Jur. 573.

or social), it is also common for the *magistrat* to devote separate sections to these issues¹⁸⁶ or to weave the discussion into the rest of the argument.¹⁸⁷

The *conclusions* or *rapport* typically ends with some closing remarks that propose, given the analysis presented, that the court dispose of the case in a certain fashion. These concluding remarks take a somewhat different form depending on whether the analysis has been performed by an advocate general (*conclusions*) or by a reporting judge (*rapport*). In the case of *conclusions*, the advocate general adopts a clear-cut position either in favor of quashing the lower court decision or in favor of rejecting the appeal. His final conclusion is usually stated in the following terms: "I therefore conclude in favor of quashing," or "in favor of rejection of the appeal."¹⁸⁸

In the case of *rapports*, however, the closing remarks tend to be less categorical. Although the reporting judge usually makes quite clear, over the course of his analysis, how he thinks the case should be decided, he frames his concluding remarks as a mere suggestion, or, as is more often the case, offers no formal suggestion at all, stating that he leaves it to the Cour to decide how the case should be handled. Thus, for example, a *rapport* ends: "It is up to the Chamber [of the Cour], given these various considerations, to take sides on the opportuneness of deciding without delay the interesting but delicate problem that your reporting judge has just presented to you."¹⁸⁹ The *rapport's* closing remarks therefore suggest that its author has merely presented the various facets of a given legal issue, and that it will be up to the Cour to decide how to resolve it.

This open-ended character of the *rapport* hints at what turns out to be an astonishing aspect of the work of the reporting judge and of the day-to-day practice of the Cour de cassation. This aspect can be observed only by gaining access to the Cour's closed dossiers. Each dossier contains the lower court decisions, the written arguments of the opposing attorneys (complete with supporting documentation), the *conclusions* of the advocate general, and finally, the *rapport*. The unedited *rapport* explains the facts and procedural history of the case, and then provides the reporting judge's legal analysis, including his *avis*, i.e., his opinion of how the case should be decided.¹⁹⁰

186. See, e.g., *Conclusions* of Dorwling-Carter, *supra* note 184, at 85.

187. See, e.g., *Conclusions* of Lindon, *supra* text accompanying note 146; *Rapport* of Combaldieu, *supra* text accompanying note 160.

188. The variations on these stock phrases are relatively minor. See, e.g., *Conclusions* of Advocate General Flipo, Judgment of May 21, 1990, 1990 Bull. Civ. I, No. 117, at 83, in 1990 ANN REP 129, 146 (1991) ("In the four cases that are today presented to you, we can only conclude in favor of the rejection of the appeals . . ."); *Conclusions* of Advocate General Bouyssic, Judgment of July 20, 1987, 1987 Bull. Civ. I, No. 160-9, at 90, in 1987 ANN. REP. 24, 29 (1988) ("Consequently, I conclude in favor of cassation of this [lower court] decision on the basis of the first two branches of the claim.").

189. *Rapport* of Massip, *supra* note 183, at 471; see also *Rapport* of Massip, *supra* note 185, at 276 ("Such are the different considerations that strike me as necessary to present to your Chamber before rendering its decision on the appeal before it.").

190. This is the portion of the *rapport* that belongs to the author, and that he takes back once the case has been decided by the Cour.

Each dossier also contains one final set of documents produced by the reporting judge: the *projets d'arrêt*.

The *projets d'arrêt* are drafts of judicial decisions, proposed by the reporting judge to his brethren. There is nothing remarkable about any given *projet*, but what is remarkable is that the reporting judge routinely produces several *projets* for each case that the Cour handles. In important cases,¹⁹¹ the reporting judge traditionally produces at least two of them: one that would serve as the basic model for a decision quashing the lower court decision, and one for a decision rejecting the appeal. The reporting judge thus proposes at least two *projets* leading to diametrically opposed results, each based on its own legal grounds.¹⁹² Furthermore, it is not unusual to come across dossiers in which the reporting judge offers three or four *projets*, each premised on different readings of different Code provisions, each stressing different aspects of the case or different arguments raised by the parties, each leading to a different—but possible and plausible—judicial response.

In a recent controversy, for example, the Cour de cassation handled several appeals from appellate court decisions denying transsexuals the right to change their sex on their official identity papers. After a lengthy discussion of the issues, in which he argues in favor of quashing the appellate decisions, the reporting justice concludes as follows:

In conclusion to these overly lengthy explanations, one should recall that should the [Cour] desire not to reject the appeals, it would have the choice of at least three formulas of quashing:

In the first case, the transsexual would be considered as belonging to the sex of which he claims to be a member and of which he has taken the appearance; this would be a complete assimilation.

A second solution could lead to the recognition of transsexualism under only those conditions responding to the requirements of the European Court in Strasbourg, thus giving only limited legal protection to the interested parties.

Finally, as none of the delicate problems evoked in the previous pages, notably with respect to marriage, have been directly raised by the appeals, the Cour could deem the examination of these questions premature and limit itself to ruling on what has been asked of it, without otherwise deciding [on the other issues].¹⁹³

Given these closing remarks, one can be fairly certain that the reporting judge has drafted at least four *projets d'arrêt*: one for each of the three “formulas of

191. Such cases come before the plenary sessions of the Cour (“*Chambres mixtes*” or “*Assemblée plénière*”).

192. See, e.g., unpublished *rapport* (on file with author) (“[D]epending on whether it accepts or not [this] principle . . . the Plenary Assembly [of the Cour] will orient itself toward rejection of the appeal or cassation. It is in this spirit that the two *projets* have been composed . . .”).

193. *Rapport* of Justice Gélinau-Larrivet, Judgment of Dec. 11, 1992, Cass. ass. plén., Bull. No. 13, at 27, in 1992 ANN. REP. 67, 102 (1993).

quashing” that he outlines above, and at least one more that would reject the appeal.¹⁹⁴ Each would be premised on different legal grounds.¹⁹⁵

The *projet d'arrêt* therefore represents the ultimate written manifestation of the interpretive uncertainty of the French judiciary. For every important decision that the Cour hands down, there remain in the Cour's dossier one or more alternative decisions, each as formal, grammatical, and syllogistic as the one actually rendered. In the archives of the Cour de cassation lie the innumerable interpretive roads not taken. These *projets d'arrêt* are kept hidden. Unlike *rappports*, of which a few examples—however heavily edited—may be published in a given year, the *projets d'arrêt* never make their way out of the Cour's internal dossiers.

2. The Magistrats' Framing of Legal Problems

Advocates general and reporting judges tend to perceive, construct, and resolve legal controversies according to certain models. This Subsection offers a basic typology of these models and explores their nuances.¹⁹⁶

a. The Legislative Gap

Contrary to what one might expect given the official portrait of the French civil judge, it is not particularly unusual for *conclusions* or *rappports* to stress the existence of legislative gaps. Indeed, one analytic mode characteristic of published *conclusions* and *rappports* consists of openly framing the discussion in terms of a perceived gap in the statutory law. The advocate general or the reporting judge is then free to present her work as merely the construction of a legal solution to this legislative insufficiency.

Take, for example, the transsexualism case discussed earlier.¹⁹⁷ In the *rapport*, Reporting Justice Gélinau-Larrivet states that “the law gives absolutely no directives” to the judges:¹⁹⁸ “Although the statutory law recognizes sexual difference, it gives absolutely no definition of sex”¹⁹⁹ Thus, Gélinau-Larrivet frames his analysis of the relevant French legal texts

194. I regret that I am unable to state how many *projets* were actually produced in this particular case. I was allowed access to the Cour's dossiers precisely on the grounds that I was performing general research on *rappports* and *conclusions*. It was made clear to me that I might well have been denied access had I asked to study the dossiers of particular cases.

195. M. le Premier Président Raymond Exertier of the Cour d'appel de Toulouse informed me that his court had recently produced seven *projets d'arrêt* for a single case. Interview, in Toulouse, France (Mar 30, 1994).

196. The ensuing analysis is based overwhelmingly on published examples of *conclusions* and *rappports*. The significance of their publication should not be underestimated: Published *conclusions* and *rappports* tend to involve particularly controversial legal issues and are therefore unlikely to be representative of routine analyses performed by the Cour. See *infra* note 229 and accompanying text.

197. See *supra* text accompanying note 193.

198. *Rapport* of Gélinau-Larrivet, *supra* note 193, at 67.

199. *Id.* at 69.

in the following terms: "The Legislative Problem[:] Except for the provisions of the Penal Code punishing certain attacks on corporeal integrity—but is this caveat even necessary?—the statutory law is silent in France."²⁰⁰ Having stressed the legislative gap,²⁰¹ Reporting Justice Gélinau-Larrivet not only can, but must, look outside the statutory law in order to produce a legal solution. The *rapport* stresses this as well, offering the following Génynesque heading: "(Re)Search for a Solution."²⁰²

b. *Applying/Interpreting Statutory Law*

i. *The Battle of Academic Doctrine*

Although *conclusions* and *rapports* identify legislative gaps with some frequency, it is more common for them to question how an existing legislative provision should be applied or interpreted. A discussion of division within *doctrine*—that is, within the ranks of legal scholars—is one of the prime means by which *conclusions* and *rapports* introduce interpretive uncertainty.

By American standards, *conclusions* and *rapports* pay remarkable attention to the opinions expressed by academics and legal commentators. The importance of academic scholarship to the analysis produced by *magistrats* is evidenced by the citation of numerous articles in support of a given proposition.²⁰³ The standard published *conclusions* or *rapport* cites over a dozen such articles, and it is by no means unusual for that number to be doubled.

The advocate general or reporting judge may engage in a closer analysis of *doctrine*, personalizing as well as summarizing a particular argument. Thus, for example, Justice Massip notes:

As for Mme Rubellin-Devichi, her position has, it seems, evolved. Although she considers associations for furthering surrogate motherhood to be illicit, contrary to the statutory law and to good morals, she wonders whether ignorance and systematic reprobation are not more dangerous than resignation . . . and whether it would not be

200. *Id.* at 80.

201. For an additional example of judicial notice of legislative silence, see *Conclusions* of Advocate General Robert, Judgment of Nov. 24, 1989, in 1989 ANN. REP. 143 (1990) ("The question submitted to your [Court] is that of the definition and of the legality of telephone wiretaps performed during the course of a preliminary investigation. . . . No special text of the Code of Criminal Procedure regulates these investigatory procedures.").

202. *Rapport* of Gélinau-Larrivet, *supra* note 193, at 92. To the French jurist, the reference to Génynesque would be obvious. Gényn, after all, urged the judge to exercise "free scientific research" in order to construct legal solutions when faced with legislative gaps. See *supra* text accompanying note 95.

203. See, e.g., *Rapport* of Massip, *supra* note 185, at 275 ("Legal doctrine is generally opposed to surrogate parenting (See, in particular: Pierre Raynaud [citation]; Pierre Kayser [citation]; Alain Sériaux [citation]; J. Rubellin-Devichi [citation]; Christian Atias [citation]; Malaurie and Aynès [citation]).").

better to tolerate and regulate that which, in any case, one cannot prevent.²⁰⁴

This practice of summarizing and personalizing arguments from *doctrine* plays an important discursive role in the composition of *conclusions* and *rappports*. The tendency of advocates general and reporting judges to marshal strings of citations of *doctrine* in support of given propositions takes on particular importance when such strings of citations of *doctrine* are explicitly divided into opposing camps. Indeed, *conclusions* and *rappports* frequently frame legal issues in terms of “controversies within *doctrine*.” In a typical example, Justice Massip states:

This thesis [put forward by the appellant] joins the opinion developed by a portion of *doctrine* with regard to the application of [Articles 760 and 915 of the Civil Code]. [citation of three scholarly articles].

For these authors

. . . .

This point of view has not, however, gathered the adherence of all authors. According to some

The idea that underlies this opinion is the same as the one retained by [the lower courts] in this case

But this controversy within *doctrine* has been settled by a decision of our Chamber on June 24, 1980

. . . .

On the other hand, the present affair poses another problem

. . . .

On this point there also exists a controversy within *doctrine*.

a) According to some

. . . .

b) But another mode of calculus has also been proposed. . . .²⁰⁵

As this example demonstrates, the consideration of academic commentary serves an extremely important function in the construction of the legal analysis

204. *Id.* (citation omitted).

205. *Rapport* of Massip, *supra* note 183, at 469–70.

The following *conclusions* offers a similar example:

As for the *doctrine*, it has expressed itself as well, principally on the occasion of the decisions that I have just recalled.

Mr. Malaurie . . . is totally against the thesis proposed [by today’s appeal]. Mr. Jean Savatier . . . as well. Mr. Henri Desbois . . . is similarly totally opposed

Mr. Rouast . . . has a nuanced position

In the camp favorable to the granting of a cause of action, one finds Mr. Holleaux

The opinion of the Mazeauds is to be found in the following passages of their Treatise. . . .

. . . .

In the face of these opinions and contrary *jurisprudence*, what side will you take?

Conclusions of Advocate General Lindon, Judgment of May 20, 1969, Cass. civ. 1re, 1969 D S Jur 429–30.

of the advocate general and of the reporting judge. It is through the presentation of controversy within *doctrine* that interpretive problems are revealed. This method of presentation easily frames the discussion of how and why a Code provision should be interpreted in a given fashion. The controversy thus serves as a discursive device that both permits, and marks the transition to, hermeneutic analysis.

Controversy within *doctrine* functions as a discursive device not only because it permits—and even calls for—the *magistrat* to discuss different hermeneutic approaches to a given interpretive problem, but also because it tends to displace the source of the interpretive difficulty. By constructing an interpretive problem as a controversy within *doctrine*, the *magistrat* identifies legal commentary—rather than legislative text—as the locus of the interpretive problem.

ii. *The Doctrine of Jurisprudence*²⁰⁶

The study of *jurisprudence* constitutes perhaps the prime function of *conclusions* and *rapports*. The advocate general and reporting judge pay extremely close attention to past judicial decisions, and the ways in which they do so offer the best means of understanding the French judiciary's conception of its own function.

A complete *conclusions* or *rapport* always cites and analyzes relevant case law.²⁰⁷ Particularly pertinent judicial decisions tend to receive closer attention. For example, after exposing different positions on *doctrine*, one reporting justice states: "But this controversy within *doctrine* has been settled by a decision of our Chamber on June 24, 1980"²⁰⁸ He then goes on to quote a portion of that decision.²⁰⁹ The reporting judge presents the precedent as possessing a certain normative force, as having "settled" a controversy once and for all: "There is no doubt that this solution, brought out with respect to Article 915 of the Civil Code, should also be applied in the case of Article 760. . . . We are therefore led to a quashing according to a formula like that of the decision of 1980."²¹⁰ The reference to, and quotation of, the precedent does not serve merely to support the argument of the reporting judge. The precedent forms the very basis of his proposed decision.

Advocates general and reporting judges typically frame their legal analyses in terms of existing *jurisprudence*. After identifying and explaining the

206. The confusion produced by the unorthodox juxtaposition of *doctrine* and *jurisprudence* is quite intentional, and shall be explained over the course of this Subsection.

207. I have not found a single *conclusions* or *rapport* that does not provide citations of previous cases—i.e., of *jurisprudence*.

208. *Rapport* of Massip, *supra* note 185, at 469.

209. *Id.* at 470.

210. *Id.*

jurisprudence, they focus on whether to apply, maintain, modify, or overturn it. The *rapport* we have been examining, for instance, argues in favor of “applying” a solution that the Cour had previously produced. In an inverted version of the same basic approach, Justice Sargos offers the following statement in one of his *rappports*: “We therefore cannot, it seems to me, apply our *jurisprudence* on the inadmissibility of prejudicial questions that are raised tardily.”²¹¹ As such examples demonstrate, the framing of the *conclusions* or *rapport* in terms of *jurisprudence* represents the displacement of the Code from the center of the *magistrat*’s analysis, and the establishment of the normative force of judicial decisions in its place. The question is no longer what the Code requires, but whether to apply a given *jurisprudence*.

The normative force *magistrats* accord to an established line of judicial decisions surfaces most clearly in those *conclusions* and *rappports* that argue in favor of overturning a settled *jurisprudence*. Such arguments reveal that judicial decisions can and do function as judicial regulations, or *arrêts de règlement*.²¹² Let us consider a particularly vivid example:

The appeal submitted to you involves work-related accidents. The precise question presented to you is that of the compensation of victims of indirect harm from such an accident. In the current state of the *jurisprudence*, such compensation is purely and simply impossible—better yet—it is forbidden.

. . . .
The norm on which you will base your decision offends the lower courts. . . .

But the lower court judges are not the only ones shocked by the rule in question.^[213] The *doctrine* also calls for its change

And, it seems to me,^[214] there are among you those who consider that the question is no longer whether the rule must change, but to determine whether the change should come from the legislator or from the *jurisprudence*.^[215]

Several months ago you already considerably relaxed your *jurisprudence* on a question that I would qualify as “neighboring”

The same extension should benefit today the victim of indirect harm.

This overturning of *jurisprudence* is socially desirable. I do not think it necessary to convince you of that. Definitely, the question that you are invited to ask yourselves is whether, given that this overturning is legally opportune, the reform should come from the legislator or from *jurisprudence*?

211. *Rapport* of Sargos, *supra* note 185, at 573, 574.

212. See *supra* text accompanying notes 15, 41, 45.

213. For analysis of the term “shocked,” see *infra* text accompanying notes 242–43.

214. For analysis of such personalization of arguments of the advocates general and reporting judges, see *infra* text accompanying notes 251–55.

215. For analysis of institutional competence arguments, see *infra* text accompanying notes 244–51.

From *jurisprudence*, I am convinced, and I will attempt to make you share this conviction.

It is not the texts [of the statutory law], in effect, that command refusing to Mrs. Rodriguez the reparation that the lower courts insist on wanting to grant her; it is, to the contrary, the meaning that your Cour has given them [the texts] at a given time in the law of tort liability. But what *jurisprudence* has done, *jurisprudence* can undo.²¹⁶

This example demonstrates the full extent of the normative force of French judicial decisions, as understood by a *magistrat*. The Cour, in giving meaning to the legislative texts, has established a norm that commands certain results and forbids others. There can be no question but that the Cour establishes iterable rules.²¹⁷

Of course, as this *conclusions* argues, the power to create implies the power to destroy, or at least to change. This proposition only demonstrates the extent to which *magistrats* (including sitting judges) are conscious of the normative power of judicial decisions. The French judge deliberately controls *jurisprudence*. The advocate general or reporting judge will thus research and present the "state of the *jurisprudence*," framing her suggestions in terms of it. When a court's line of decisions appears clear, the *conclusions* or *rapport* will offer a statement along the following lines: "Your *jurisprudence* thus emerges, clear, sharp, and as we noted earlier, constant."²¹⁸ Such a statement does more than just make explicit the existence of a clearly delineated judicial position. The use of the possessive pronoun "your" suggests the court's agency and control.

The French court's power to control its *jurisprudence* deliberately, to create and change its normative position on a given point of law, can give rise, in *conclusions* and *rappports*, to detailed historical analyses of the development and modification of judicial norms. The following passage, entitled "The Evolution of the *Jurisprudence*," is drawn from a *conclusions*:

The first stage in the evolution took place in 1979 [citation] when the First Civil Chamber [of the Cour] acknowledged that . . .

More significant and more noticed, the second stage of the evolution occurred a few years later when the First Chamber, on 29

216. *Conclusions* of Joinet, *supra* note 183, at 147-49.

217. Ernest Emmanuel Frank, Président de chambre honoraire à la Cour de cassation, goes so far as to speak of "precedents" and "precedents from *jurisprudence*." Frank, *L'élaboration des décisions à la Cour de cassation*, 1983 Recueil Dalloz [D. Chron.] 119, 121-22. The notion of "judicial precedent" is totally foreign to the official portrait of the civil judge, and the term is almost never used, even in unofficial discourse.

218. *Conclusions* of Flipo, *supra* note 188, at 137. An unpublished *conclusions* (on file with author) offers the following sarcastic variation: "[The Criminal Chamber's] position, on the subject before us, is constant, basaltic."

March 1984, and especially the Plenary Assembly [of the Cour], on 7 February 1986, decided that

. . . .
It is therefore due above all to the initiative of the First Civil Chamber that, in two strokes, the evolution desired by the [academic] authors was produced.

In a first decision of 8 March 1988 . . . the First Chamber extended the field of contractual liability

. . . .
But what was this foundation?
The answer was given by the First Chamber in another decision of 21 June 1988, which explicitly bases itself

. . . .
In 1988, the Cour did much more than take a step down an already open path. It changed paths. Its decisions do not lie within the line of previous *jurisprudence*. They are of a different nature.

. . . .
The two decisions rendered in 1988 cannot be disassociated. While the first sets out the principle—to which we shall return—of “double limitation”—the second confers on the theory of group contracts a spectacular power in positive law.²¹⁹

This passage stresses the programmatic quality of the Cour’s evolving treatment of group contracts. That evolution is due “above all to the initiative of the First Civil Chamber.”²²⁰ Through the reversal of *jurisprudence*, it results in a decision that “confers on the theory of group contracts a spectacular power in positive law.”²²¹ The substantive question addressed by the *conclusions* concerns whether the Cour’s new *jurisprudence* should be extended even further.

At times, *conclusions* and *rapports* seek—in a remarkably overt fashion—to put to good use the programmatic and normative powers of French judicial decisions. In the following example, the advocate general seeks to convince the Cour to change its *jurisprudence*. After having addressed the issues presented by an appeal and offered his proposed response, Advocate General Lindon continues his *conclusions*:

But, having reached this point, one realizes that the problem starts anew. It’s that on the occasion of a Supreme Court decision, you might be tempted to consider a problem akin to the one presented today, the problem of the difference established by your decision of 13 January 1959 between the adulterine child to whom the law accords the Article 342(2) action [for palimony], and the natural child [born out of wedlock] to whom you refuse it.

219. *Conclusions* of Advocate General Mourier, Judgment of July 12, 1991, Bull. No. 5, at 7, in 1991 ANN. REP. 105, 109–11 (1992).

220. *Id.*

221. *Id.*

Your position, as you know, is criticized.

....

It's in thinking of these [natural children] that I want to envisage the eventuality of a change, on the occasion of your decision today, of your *jurisprudence*.

To obtain this change, it would suffice for you to say, in the heading of your decision, not that Article 342 cannot be invoked by a legitimate child, but that it can only be invoked by an adulterine or natural child.²²²

....

Finally, here is the third aspect of the problem, and it's not the least important: by seeking to ameliorate the lot of natural children, in connection with an appeal that only concerns a legitimate child, you will go beyond the claim. But going beyond the claim is an operation that the technique of our Cour condemns, in principle.

....

But then, one might ask: "Is it not appropriate to go beyond it?" The answer is relatively easy when one considers the reason that inspired the rule. This reason is that your role is to respect the limits of the debate and to wait, in order to resolve a question, until it has been presented to you. But precisely, the question of which we speak, will anyone ever present it to you, or at any rate, will anyone present it to you before a long time has passed? Since your decision of 1959, there is no practitioner, be he of the most distant province, who does not know that you refuse the benefit of Article 342(2) to natural children. . . . One thus finds oneself in a vicious circle: if you do not go beyond the claim, it will be a long time before an appeal offers you the chance to rule on the applicability of Article 342(2) to natural children, and if such an appeal is never submitted to you, how could you make known your intention to go back on your 1959 *jurisprudence*?

Therefore, this leads me to think that it is worthwhile, if you wish to make known that a natural child can henceforth invoke Article 342(2), to say it in your heading, even by going beyond the claim.

But that's not all. Your decision, the composition of your heading, must not invite misunderstanding. And I would ask you, in this regard, to take two precautions. First, to render your decision after deliberation in counsel chambers, so that everybody knows perfectly well that the formulation that you adopt is not the result of inadvertence. And then, not to choose a discreet, padded [formulation], as if you had misgivings about proclaiming what you are doing, but to adopt a formulation that is clear and categorical; to act in such a way that your decision be a signal and not a wink.²²³

222. The appeal was raised by a "legitimate" child born from adulterous relations but "legitimated" by his legal father. Lindon is seeking to make Article 342(2)'s palimony action available to children born out of wedlock ("natural" children), but to keep it unavailable to "legitimate" children born from adulterous relations.

223. *Conclusions* of Lindon, *supra* note 205, at 429, 430-32.

In this passage, Lindon is trying to convince the Cour “to go back on” and “to change” its rule of *jurisprudence* (established in a 1959 decision) forbidding “natural” children from suing for palimony under Article 342(2) of the Civil Code. In order to “improve the lot of natural children,” Lindon asks the Cour to permit such children “henceforth to invoke Article 342(2).”²²⁴

The problem—other than the rather unfortunate fact that the text of Article 342(2), at the time of the suit, only stated that its palimony action was available to “children born from incestuous or adulterous relations”—is that the appeal before the Cour has nothing to do with natural children; hence Lindon’s argument, which could simultaneously be termed “realistic” or “sophistic,” that the Cour should “go beyond the claim.” Lindon, in short, is asking the Cour to adopt a new stance on *jurisprudence* regarding Article 342(2), one that would both permit and govern an entire new class of future cases. This is a stunning argument, given the official portrait of the French civil judge. “Establish this new, categorical and prospective rule,” Lindon overtly argues, “which will create and control a whole new cause of action, do so on the occasion of this unrelated case, and in order to let it be known that you are doing so intentionally, do so in the following fashion.” The argument succeeded: The Cour acted precisely as Lindon requested. The decision states as its legal basis: “Given Article 342(2) of the Civil Code;—Whereas the palimony action foreseen by this text can only be entertained if brought by a *natural*, adulterine or incestuous child”²²⁵

3. *Argumentative Modes*

Once the legal problem is framed, how do French *magistrats* justify the creation of a normative judicial solution? As this Subsection suggests, *conclusions* and *rappports* tend to adopt one of a handful of modes of argumentation.

To be sure, in the internal discourse of the French judicial system, formalist exegesis of the Code remains a primary mode of legal argumentation. Indeed, the mere existence of assorted hermeneutic methodologies within the internal discourse of the French judicial system hardly implies that French judges and academics believe that all legal problems are open to hermeneutic analysis. The underlying assumption remains, as in mainstream French academic *doctrine*, that hermeneutics only come into play when a grammatical application of the statutory law fails to resolve the case at hand.²²⁶ Good old-fashioned grammatical analysis of codified legislative texts, that is, analysis commonly associated with the nineteenth-century School of Exegesis, remains

224. *Id.* at 431.

225. *Id.* at 432 (emphasis added).

226. See *supra* text accompanying notes 125–26.

the starting point—and quite often the ending point—of many *conclusions* and *rappports*.²²⁷ Because so few *conclusions* and *rappports* are published,²²⁸ it is reasonable to assume that those that are raise highly controversial legal questions and thus offer a skewed picture of the internal discourse of the French judicial system.²²⁹ Nonetheless, traces of straightforward formalist/grammatical analysis are visible even in these *conclusions* and *rappports*. Take, for example, Lindon's *conclusions* in the palimony action.²³⁰ Lindon's first argument is grammatical in orientation, focusing on the literal text of the Code, and presenting its conclusion as the outcome compelled by simple application of the traditional rules or canons of statutory construction.²³¹

Once *conclusions* and *rappports* move beyond the grammar traditionally associated with the French judicial system, they tend to adopt particular argumentative modes that are readily traceable to the primary concerns of the mainstream academic theories introduced in Section A of Part IV. By far the most common of these recurrent arguments are those based on the need for legal adaptation and equity.

a. *Legal Adaptation*

The call for legal adaptation surfaces overtly in a large portion of published *conclusions* and *rappports*. The following sentence, taken from the final paragraph of a *conclusions*, offers an example: "[O]ne must 'return to the fundamental concept that the supreme Cour is destined to control the exercise of the role of legal adaptation by the courts.'"²³² According to Advocate

227. The continued importance of formalist grammar is revealed by the basic structure of the *conclusions* and *rappports*. These arguments, as I have already noted, almost always begin with a statement of the statutory law.

228. The traditional French legal publications, furthermore, publish but a small percentage of official judicial decisions. This holds true even for the Cour de cassation. Only those decisions that present "legal interest" get published. For a brilliant analysis of the relation between the practice of legal publication and the creation of judicial norms, see SERVERIN, *supra* note 73.

229. Access to the dossiers of the Cour de cassation hardly corrected this informational flaw. Thinking they were doing me a favor, members of the Cour thought it would be helpful to present for my perusal a selection of "particularly interesting"—as opposed, I am afraid, to particularly representative or mundane—cases. I was never able, in fact, to convince the Cour that a "boring" breach of contract case might be of greater interest to my study than a controversy considered sufficiently problematic to require consideration by a Plenary Assembly of the Cour.

230. *See supra* note 223.

231. *Id.* The rules of traditional statutory construction closely resemble Friedrich Schleiermacher's canons of grammatical interpretation. *See* Friedrich D. Schleiermacher, *The Compendium of 1819 and the Marginal Notes of 1828*, in HERMENEUTICS: THE HANDWRITTEN MANUSCRIPTS 95, 117 (Heinz Kimmerle ed., 1977). Lindon's literalist argument, premised on the reading of Article 342 in the context of the heading under which it is placed in the Civil Code, corresponds quite well, for instance, to Schleiermacher's second canon of grammatical interpretation: "The meaning of each word of a passage must be determined by the context in which it occurs." *Id.* at 127.

232. *Conclusions* of Advocate General Picca, Judgment of Jan. 21, 1987, Cass. soc., 1987 D. Jur. 111, 113 (quoting Tunc, *supra* note 72).

General Picca, the judicial adaptation of the law serves several essential functions: "To abandon this mission, which constitutes the essential basis of the role of a Cour, which regulates the law, would compromise both the unity of the law and the security of the justiciable."²³³ Judicial decisions, the argument more often goes, should take into consideration the evolution of modern society. Advocate General Dotenwille presents the argument in a dramatic fashion:

Is he [Dotenwille] faithful to [Article 1384 of the Civil Code], that will be for you supreme judges to judge, bearing in mind that he who expresses himself has as a mission, with modesty, reserve and prudence, to propose [Article 1384's] transposition to a world in profound mutation

. . . .
Does the general principle presented by Article 1384(1) . . . authorize an adaptation to a changing society, which generates new types of cases that its authors could never have imagined . . . [?]

. . . .
I think that such a work of renewal is conceivable

. . . .
I believe in a living law, and I believe in a certain audacity.[]
I conclude, faced with the future, in favor of rejecting the appeal.²³⁴

The law must change to keep up with the times, argues Advocate General Dotenwille, and the judiciary should take part in that change. An unpublished *conclusions* thus asks: "Have we not become the arbiters of the facts of our society . . . led by this very fact to forge ahead, which bothers certain jurists, who, taking their time, are surprised by an evolution of the sources of the law, an evolution off of which they nonetheless feed[?]"²³⁵

Such arguments in favor of judicial adaptation of the law are of a profoundly different nature than those underlying the official portrait of the French civil judge. They are fundamentally hermeneutic; they call for the interpretation of the statutory law on the basis of some theory of the role of the judge and of the law in French society. The law and the judge serve a vaguely defined social function. By fulfilling this function, they advance certain basic policy objectives, such as "the unity of the law and the security of the justiciable."²³⁶ Judges, the argument concludes, must interpret the law

233. *Id.*

234. *Conclusions* of Advocate General Dotenwille, Judgment of Mar. 29, 1991, Bull. No. 1, at 1, in 1991 ANN. REP. 65, 66, 68, 93-94 (1992); see also unpublished *conclusions* ("In this case, it is a solution of rejection of the appeal that you will undoubtedly be brought to adopt. Such is the decision that I wish to call for, my gaze turned toward the future.") (on file with author); unpublished *conclusions* ("Once again, let us be of our own times.") (on file with author).

235. Unpublished *conclusions* (on file with author).

236. See *supra* text accompanying note 233.

in terms of this function, and therefore give the law meaning in an ever-changing society.

b. *(In)Equity*

Advocate General Joinet begins one of his *conclusions* as follows:

Your Plenary Assembly [of the Cour de cassation] is asked to determine whether the time has come to fill a legal void—I mean by this to put an end to a situation in which the disparity between the norms and the “life” that they are supposed to govern is such that the law can no longer fulfill its function of regulator, of bearer of nonconflictual and equitable solutions to the difficulties of the justiciable.

Should the law stray too far from reality, it would lose one of the essential conditions of its legitimacy: that of being perceived as acceptable by [those to whom it applies]. Rules that are too rigorous, too unshakable in their logical purity, and that lead to socially absurd situations are a menace to the credibility of the entire legal system to which they belong.²³⁷

This opening passage constructs the same basic hermeneutic framework as that offered by the legal adaptation arguments. Law serves a social function as “regulator” and “bearer of . . . equitable solutions.” The exercise of these functions advances certain fundamental policy objectives, including legitimacy and acceptability. The judge must interpret law in terms of its function and policy objectives to render it meaningful (i.e., not “socially absurd”).²³⁸

The problem, as Joinet understands it, is that “the law [has] stray[ed] too far from reality”—that a disparity exists between legal norms and the “‘life’ that they are to govern.” But the identification of this perceived departure, which introduces the terms “life” and “reality” into the interpretive discussion, represents a radical departure of its own—a departure from the text-centered legal analysis and formalist grammar of the French judicial system. Something external to the grammar of the legal text drives the analysis. That something external is equity: “I have already invoked the human, social, and inequitable consequences of this [rule].”²³⁹ The concept of equity, as utilized by French *magistrats*, possesses positive value. It permits just and meaningful judicial responses to legal controversies. But at the same time, it stands for a lack in

237. *Conclusions* of Joinet, *supra* note 183, at 147.

238. The following statement, objecting to a strict “exegetical” (French 19th-century formalist) reading of a vague statute, is also instructive: “‘Restoration of organic functions,’ what is that if not *everything*, if one sticks to [formalist] exegesis . . . [?] But exegesis is not a one-way street! If one remains attached to the almost byzantine analysis of this phrase, we risk to slide toward the absurd.” Unpublished *conclusions* (on file with author).

239. *Conclusions* of Joinet, *supra* note 183, at 155.

the grammar of the Code. Thus, equity serves to correct socially absurd results produced by “rules that are too rigorous, too unshakable in their logical purity.”²⁴⁰ Equity therefore operates as a two-sided trope. It signifies that the statutory law is not self-sufficient, due to its potential absurdity or meaninglessness; it also stands for all that is external to the legal code, in terms of which the statutory law should be read. The very notion of “equity” posits a theory of the social function of the law: Law’s “inside” (grammar) must be responsive to its “outside” (social “life” or “reality”). Equity thus posits the necessity of hermeneutic reading: the production of meaning on the basis of a theory external to the grammar of the legal code.²⁴¹

The transition to the hermeneutics of equity is typically supported by a change in the tenor of the *magistrat*’s argument. The *magistrat* adopts a more personal tone, best described as righteous indignation.²⁴² A French *magistrat* will inevitably resort to the term “shocking” whenever he shifts to equity argumentation. The following example offers a few variations on the theme: “It would be morally unacceptable that Such a solution would be all the more shocking in that It would simply be scandalous that That is why the decision attacked here . . . appears tainted by a fundamental inequity.”²⁴³ The rhetoric of the “shock” marks the confrontation of the grammar of the Code with the outside reality that equity represents. This confrontation drives the *magistrat* into a more personal register, from which he can respond as a social being rather than as a passive applicator of the matrix of the Code. In this register, the *magistrat* (and thus the judiciary as a whole) is personally shocked by the effects of the mechanical application of a legal rule. The *magistrat* can and must affirmatively respond. He must “intervene” to change the rule.

240. *Id.* at 148. The French *magistrats*’ frequent turn to equity directly contradicts Merryman’s claim that in civil law systems, judges only possess and exercise equity powers when the legislature has expressly delegated such powers to them. See MERRYMAN, *supra* note 7, at 51–56.

241. It should be noted that “equity” thus serves as a free-floating signifier of all that is “outside” or “external” to the grammar of the Code, and can be filled with just about anything. Most commonly, “equity” concerns consist of various social and economic policy arguments. See, e.g., *Conclusions of Joinet*, *supra* note 183, at 148; *Conclusions of Charbonnier*, *supra* note 183, at 108.

242. [T]he strict observation of this rule leads to results that, from the point of view of humanity, from the point of view of equity, are extremely shocking. . . .

. . . .
And thus, in the current state of the law in the matter, parents are compelled to submit the health of their child to the fate of a bet! Do I not have the right to use the epithet “shocking” to describe such results?

Conclusions of Lindon, *supra* note 146.

243. *Conclusions of Charbonnier*, *supra* note 183, at 116–17; see also, e.g., *Conclusions of Joinet*, *supra* note 183, at 148 (“But the lower court judges are not the only ones shocked by the rule in question.”).

c. *Institutional Competence*

When a *conclusions* or *rapport* discusses whether the judiciary should intervene, its argument is framed in terms of institutional competence. There are two primary issues. The first, and most frequently discussed, concerns the allocation of powers between the legislature and the judiciary. Given the respective provinces of the legislature and of the judiciary, can the judiciary establish a new solution to a given legal problem? The second issue, which presupposes an affirmative answer to the previous question, concerns the relative benefits of adopting a judicial—as opposed to a legislative—solution. Should the judiciary construct the new solution, and if so, why?

The following example illustrates the traditional argument against the formulation of a judicial solution. It is drawn from the first of two major cases involving transsexualism handled by the Cour de cassation within the last four years. Advocate General Flipo argues against judicial recognition of sex changes:

Such problems cannot be resolved by *jurisprudence*. They can only be [resolved] by the statutory law. Since the judge is the guarantor of the statutory law, he must interpret it and not make it.

What is asked of you today, as is too often the case, is to go beyond your role as the regulatory Cour, it is to take the place that belongs to the legislator.

Many arguments are put forward to tempt you to attribute to yourselves a privilege that is not yours. . . .

. . . . The judge must fulfill [his role], which is to apply the statutory law. Let us leave to the legislator his own [role]. If he wishes, as have other foreign States, to legislate on this matter, let him do so and the statutory law that he will have made shall be applied. But it is clear that you cannot and must not substitute yourselves for him.²⁴⁴

Flipo's argument presents the classic, straightforward, and categorical argument against judicial lawmaking. The judicial role consists of applying and interpreting the statutory law. Making law is reserved for the legislator. Resolving the problems raised by transsexualism would amount to judicial usurpation of the legislative function.

The following *conclusions* offers a more nuanced position. Advocate General Mourier states:

It is true that Article 1165 was better adapted to an individualist civilization than to the social and economic relations of our time, and

244. *Conclusions* of Flipo, *supra* note 188, at 140–41.

that it becomes more and more difficult to consider contracts in an isolated fashion. Thus the legislator—by granting direct causes of action—and the *jurisprudence*—by playing with various legal mechanisms . . . have greatly cut into the rule of the relativity of contracts.

But this rule still exists, and the new interpretation, which must be given to Article 1165 to generalize the mechanism of group contracts, would this time entail putting [the rule of Article 1165] to death, rather than producing another simple decline [in the rule]. It might be preferable to let the legislator exercise a power that does not belong to the judge.²⁴⁵

This example presents a different image of the boundaries of the judiciary's institutional competence. Mourier suggests that there exists a certain gray area of acceptable judicial manipulation of a codified rule. He not only states that the judiciary—for social and economic policy reasons—has in fact played with Article 1165's rule, thus greatly cutting into it, he also seems to imply that such behavior was and is permissible.²⁴⁶ The problem arises when the new judicial interpretation, rather than simply causing a further erosion in the rule (which would apparently be acceptable), would actually "put[it] to death."²⁴⁷ The judiciary, Mourier suggests, is institutionally competent to perform limited eviscerations of Code provisions, but should leave executions to the legislative branch.²⁴⁸

In the Cour's second major case on transsexualism, Justice Gélinau-Larrivet presents the following arguments to his peers:

A rejection of the appeals might compel the legislator to react. On the other hand, the recognition of the legal effects of the transsexual syndrome would permit the economy of a [legislative] text, which physicians and the public authorities fear would produce, as in Italy, a multiplication of requests for intervention.

Several considerations support the thesis of those who question the utility of a legislative text. . . .

—On the theoretical level, it would be difficult for the legislator to avoid problems of an ontological nature. . . .

The parliamentary debates would lead to a questioning of sexual identity Simple and objective criteria, on which rest the declaration of sex at birth, might well be brought into question. . . .

The legislator would also be confronted with the problems that the recognition of transsexualism presents in the matters of marriage, divorce, and filiation, with the risk of destabilization in this part of the Civil Law. . . .

245. *Conclusions* of Mourier, *supra* note 219, at 121.

246. *Id.*

247. *Id.*

248. It is unclear whether Mourier's tentative turn of his final phrase ("It might be preferable") is sarcastic, understated, or sincere.

—On the technical level: Until now, no definitive explanation has been produced of the origin of transsexualism. The progress that will come about on the issue could put into question the work of the legislator, whereas the *jurisprudence* adapts faster.

...
—Finally, on the practical level, we have already evoked the perverse effects of the legislative consecration of a phenomenon that is, fortunately, marginal. . . .^[249]

...
It is thus to the road of *jurisprudence* that one should turn.²⁵⁰

As this section of Justice Gélinau-Larrivet's *rapport* demonstrates, the issue is not whether the Cour can construct a new solution to the legal problem posed by transsexualism. The debate does not center on the separation of powers. The reporting justice assumes, without even bothering to explain why, that the judiciary can assume the regulatory role that the legislature has apparently hesitated to exercise, if doing so would be necessary and desirable. Instead, the debate focuses on a question of institutional policy: *whether* the Cour should construct the solution to the legal problem posed by transsexualism. Gélinau-Larrivet turns to the benefits offered by a judicial—as opposed to a legislative—solution. Framed as such, the institutional competence discussion is transformed into the hermeneutics of policy analysis.²⁵¹

d. *The Personalization of Unofficial French Judicial Discourse*

In the largely hermeneutic field of *conclusions* and *rapports*, in which French *magistrats* argue for or against the adoption, rejection, or application of judicial norms on the basis of contested policy and equity considerations, the civil judge does not speak as she does in her official judicial decisions. She does not speak, to use Montesquieu's expression, as if she were "the mouth that pronounces the words of the [statutory] law."²⁵²

In her *conclusions* and *rapports*, the French *magistrat* always speaks in the first person. She is a person distinguishable from the statutory law, one who

249. This sentence explicitly transposes the rhetoric of "perversion" from the sexual to the legal realm. The *conclusions* in the previous transsexualism case merely left the judiciary's perverse adoption of the legislator's role implicit. See *supra* text accompanying note 244.

250. *Rapport* of Gélinau-Larrivet, *supra* note 193, at 80–81, 93.

251. Gélinau-Larrivet analyzes whether it might not be better institutional policy to spare the legislature embarrassing debates "of an ontological nature" and on a systemic level, to avoid "the risk of destabilizing this part of the Civil Law." He questions whether it might not be better, given the fact that "*jurisprudence* adapts itself faster [than legislation]," to adopt a judicial solution rather than run the risk of having future medical breakthroughs "put into question the work of the legislator." On the level of social policy, he asks if it might not be wise to avoid the production of a legislative text, that is, to avoid "the legislative consecration of a phenomenon which is, fortunately, marginal," lest such a text "produce, as in Italy, a multiplication" of the phenomenon, as "physicians and the public authorities fear." *Id.*

252. MONTESQUIEU, *supra* note 75, at 163.

exercises agency and speaks in her own right. She—the “I”—has an opinion. At the same time, the transition to the first person marks the loss of the unquestioned (and unquestionable) authority of the statutory law; when the judge speaks, she utters what is only an opinion. This loss of interpretive authority surfaces in the language of the advocates general and of the reporting judges. “The first claim . . . *appears to me* to call for a dismissal, but the second . . . leads, *it seems to me*, to reversal.”²⁵³ The common use of such qualifying personal interjections marks the *magistrat*’s interpretive insecurity. The language of the *conclusions* or *rapport* calls attention to the presence of the *magistrat*, signaling a certain tentative quality to the argument. Statements introduced by “it therefore appears preferable to me to answer that”²⁵⁴ do not exude a sense of interpretive necessity.²⁵⁵

The personalization of the *magistrat*’s language represents its fallen, relativized status: It is but opinion, but one option among many. The same holds true for judicial decisions, whose authoritative status is undermined by their personalization in the *magistrats*’ arguments. The constant references to “our [or your] *jurisprudence*” or to “our [or your] decision,” while recognizing the existence of normative judicial rules, simultaneously recognizes that the *jurisprudence* in question is only “ours [or yours],” and that others do exist. Hence the statement, “We therefore cannot, it seems to me, apply our *jurisprudence*,” sends out several messages. It affirms the existence of a judicial norm capable of being applied, but it also expresses a certain hesitation on the part of the *magistrat* as to whether it should be applied. Finally, it suggests the relativized status of the norm; it is “ours,” which may be different than “theirs,” and which therefore may not necessarily be the required rule. After all, “we” produced it.

4. *The Doctrine of the Cour*

On December 10–11, 1993, a major conference took place in the Grand Chamber of the Cour de cassation in Paris. Approximately thirty Justices, advocates general, and legal academics presented papers at the conference,

253. *Rapport* of Sargos, *supra* note 185, at 573, 574 (emphasis added); *see also, e.g., id.* at 573 (“The above references will permit, it seems to me, the better understanding of the problems raised by the appeal.”); *Rapport* of Massip, *supra* note 183, at 469, 470 (“The answer should, besides, it seems to me, be negative.”); *Rapport* of Combaldieu, *supra* note 160, at 186 (“That is why I believe, as for me, that the action of the concubine must be, in such a case, vigorously rejected.”).

254. *Rapport* of Sargos, *supra* note 185, at 574.

255. French *magistrats* use several similar constructions, such as the use of third-person constructions, “one can ask oneself if,” “one can maintain that,” or “one can respond that”; or the use of the conditional tense, “[t]here is a fourth consideration that could lead one to estimate that . . .” *See Rapport* of Massip, *supra* note 185, at 273, 274; *see also, e.g., Conclusions* of Mourier, *supra* note 219, at 116 (“If the advantages of predictability do not strike me as determinative, I am, on the other hand, more sensitive to the argument of judicial coherence invoked by the [academic] authors in favor of extension of the contractual field.”).

entitled "The Doctrinal Image of the Cour de Cassation." The title appeared to imply that there exist several images of what the Cour does—one of which is academic, i.e., the image of *doctrine*. Given its title, one might have expected the conference to address the disparity between this particular image and, for instance, the Cour's image of itself. The speakers, however, did not address the topic of images of the Cour, i.e., what such images consist of and who produces them. Instead, the speakers all addressed the perennial problems of French legal theory, *inter alia*, whether the Cour's decisions possess normative value, whether they constitute part of France's positive law, and whether they infringe on the separation of powers. The key word in the conference's title was not "image" but "*doctrine*"; the participants constantly referred to an expression that surfaces only rarely in French legal publications: "the *doctrine* of the Cour." This expression, which has only recently slipped into French legal discourse,²⁵⁶ accurately encapsulates the complex unofficial portrait of the role of civil judge. On one important level, the expression is nonsensical in terms of the official French portrait: *Doctrine* is what legal commentators, not the courts, produce; and because the courts only apply the statutory law, they cannot create judicial doctrine (in the common law sense of "Supreme Court doctrine"). But on another level, the expression accurately conveys the primary characteristics of the French civil courts (especially the Cour de cassation), as depicted in the unofficial French portrait.

Understanding what is in play on this second level requires sensitivity to the now-double connotation of the term "*doctrine*." Another meaning has been added to its traditional connotation: an authoritative judicial position governing a given legal issue. This alternative meaning, relatively unproblematic to the American jurist, runs counter to the entire official French portrait of the civil judge. It is indeed difficult to square the following statement, "the [Cour de cassation] proclaims its [judicial] *doctrine* and, when necessary, imposes it,"²⁵⁷ with the prohibition, stated in Article 5 of the Civil Code, against "general" and "regulatory" judicial pronouncements. And yet, as we have seen in the *conclusions* and *rapports*, French *jurisprudence* clearly possesses enormous normative power; the Cour indeed "proclaims its *doctrine* and, when necessary, imposes it."²⁵⁸

This observation does not end the matter. The original meaning of the term "*doctrine*" has not been altogether lost, even in the expression "the *doctrine* of the Cour." The term retains a resonance of commentary, of opinion, of taking a stand in the legal academics' controverted field of multiple and conflicting interpretive possibilities. The term retains the resonance of the

256. See, e.g., André Perdriau, *La portée doctrinale des arrêts civils de la Cour de cassation* [The Doctrinal Impact of the Cour de cassation's Civil Judgments], in 1990 ANN. REP. 59 (1991).

257. *Id.* at 61.

258. *Id.*

expression "controversy within *doctrine*."²⁵⁹ The expression "the *doctrine* of the Cour," just as the expression "*our* [or *your*] *jurisprudence*," thus signifies a certain personalization of the Cour; the Cour is but one position taker among many.²⁶⁰

The insertion of the Cour's judicial doctrine into the controverted academic field of debate within *doctrine* manifests itself, in the *conclusions* and *rappports*, as the *magistrat*'s keen awareness of academic *doctrine*'s reception of the Cour's judicial doctrine. The advocate general or the reporting judge will sometimes relate the positive reception of *jurisprudence* among legal commentators.²⁶¹ More often, however, the *magistrat* will support his argument for a change in the Cour's *jurisprudence* with an introductory sentence along the following lines: "Your position, as you know, is criticized."²⁶² This example demonstrates the personalization of the Cour's *jurisprudence*,²⁶³ as well as its reduction to a mere position, and one that is criticized at that.²⁶⁴ The French *magistrat* is aware that he is taking a position in the field of debate within *doctrine*. He is therefore sensitive to the future reception of new judicial doctrine, as this final example demonstrates:

[I]f you extend the benefits of Article 342(2), . . . you will expose yourselves to reproaches of contradiction; because here is, and I'm playing the role of devil's advocate, what they will be able to say to you . . . ; but then, will they say

You want, will they say as well,

Finally, they will say²⁶⁵

The French judge, in establishing judicial doctrine, has become personally answerable to "them," that is, to academic *doctrine*. His normative power to establish judicial doctrine has been acquired at the price of agency ("you want").²⁶⁶

The unofficial French portrait of the civil judge, as encapsulated in the expression "the *doctrine* of the Cour," presents the judge as exercising an

259. See *supra* notes 203–05 and accompanying text.

260. The passage of the French judge into the field of *doctrine* is perhaps best exemplified by a relatively recent phenomenon. In particular, it has become not uncommon for a reporting judge to have portions of his *rapport* published as the case "note" (case comment) immediately following the text of the Cour's decision. For a recent example, see Judgment of Jan. 6, 1994, Cass. ass. plén., 1994 Bull. Civ. I, No. 382 note Renard-Payen.

261. See, e.g., *Conclusions* of Bouyssic, *supra* note 188, at 26 ("This *jurisprudence*, very favorable to the victim, is generally approved.").

262. *Conclusions* of Lindon, *supra* note 205, at 429, 430.

263. Premier Président Exertier's remark "I must maintain my *jurisprudence*" is once again pertinent. See *supra* note 169 and accompanying text.

264. Note the subtle difference in the way "approved" and "criticized" judicial "doctrine" is presented. When "approved," it is termed "this *jurisprudence*"; when criticized, it is termed "your position."

265. *Conclusions* of Lindon, *supra* note 205, at 431.

266. The following statement in an unpublished *rapport* also illustrates the point: "Finally, if we want to bend the *jurisprudence*" (on file with author).

interpretive practice that cannot simply be termed grammatical. Statutory law can no longer be understood as the generative matrix of all French judicial decisions. Whether he is regarded as establishing normative judicial doctrine, or as partaking in the conflict of opinions within *doctrine*, or both, the agency of the French civil judge has been intercalated between statutory law and judicial decisions.²⁶⁷

5. *Of Judges, Automobiles, and Article 1384 of the Civil Code*

To the French jurist, the judiciary's contribution to the law of civil liability represents the clearest example of the civil judge's power to create law. As has often been remarked, the French judiciary has constructed almost all of modern French tort law on the basis of a mere five articles of the Civil Code.²⁶⁸ The following *conclusions*, from a tort case involving a traffic accident, illustrates almost all the elements analyzed in this Part:

The judges had, in this affair, to apply a classic text [Article 1384(1) of the Civil Code²⁶⁹] to a situation that is no less classic (an accident involving pedestrians hit by an automobile while crossing a street).

And yet what difficulties in arriving at the solution to the problem of liability! Objections, replies, contradictory decisions and, in the end, the supreme Cour is called upon[]. Perhaps the present case will be for us the occasion to put our finger on one of the causes of these complications.

The lower court judges had found the victims negligent in two respects And the judges had considered, by way of a manifestly erroneous determination, that for the driver this behavior had been of a character both unforeseeable and unavoidable, of a nature to exonerate him of the liability rightfully resting on him by virtue of [Article 1384].

The appellate court, for its part, reversed the solution and judged the driver alone liable.

Is the truth not somewhere between these two extremes, at some mean viewed as golden?²⁷⁰ In reality, should it not have been decided that the driver of the vehicle was at least partially exonerated

267. See also *Rapport* of Gélinau-Larrivet, *supra* note 193, at 102 ("[O]ne should recall that should the [Cour] desire not to reject the appeals, it would have the choice between at least three formulas of cassation.").

268. See C. CIV. arts. 1382–86; see also Edward A. Tomlinson, *Tort Liability in France for the Act of Things: A Study of Judicial Lawmaking*, 48 LA. L. REV. 1299, 1299 (1988). Merryman incorrectly suggests that the French body of tort law springs only from Article 1382. See MERRYMAN, *supra* note 7, at 56.

269. "One is responsible not only for the damage that one causes by one's own act, but also for that which is caused by the act of persons for whom one must answer, or of things that one has under one's custodianship." C. CIV. art. 1384(1).

270. The French original refers to "*un milieu . . . réputé juste*," a phrase that simultaneously evokes the expression "*le juste milieu*" (the golden mean) and the idea of justice.

of his liability by the faults of the victims, even though [the victims' behavior was] neither unforeseeable nor unavoidable?

. . . .

But the appellate court remained silent on the second fault imputed to the victims: the absence of precautions in crossing the road. . . .

Reversal therefore seems in the logic of the principles.

This case, however, leads us to question the value, fundamentally, of such a solution.

The necessity of responding to the argument of the driver was evident and the appellate court . . . could not have failed to be conscious of it.

But the difficulty in responding was great and it appears that, rather than give in to the argument, the appellate judges evaded the obstacle.

Why then this reaction? No doubt because they considered it equitable to ensure that the victims of this accident receive total reparations and because taking into account the defense's objection would have led them to grant but a partial reparation.

Such an attitude, often observed, warrants our attention.

Is it not a sign of a tension, at the level of the application of the legal rule, between the substance of this rule and the demands of justice, such as they are currently felt?

And if such is the case, if the legal principle does not engender the just solution, then because in this case the principle is one of *jurisprudence*, because it is you who established it, you are the masters of it and you can change it.

I propose that to reconsider this subject, one must start far back, because the principle in question—that of the partial exoneration of the custodian of an object by [the foreseeable or unavoidable] fault of the victim—is integrated in a whole from which it should not be removed unless it does not occupy a logical and necessary place.

At the heart of the idea of liability, one finds the idea of fault. They are inseparable from each other, for man is so made that he does not accept that a damage be imputed to him if some failure of comportment does not appear at the origin of the damage. It is a question here of a primary, profound, and irreducible sentiment, which is none other than the sentiment of justice.

Dean Carbonnier has expressed it remarkably:

"The harm having been produced, a voice questions man: who did it? what did you do? A man must answer before his conscience—this is moral responsibility; before the law, it is legal liability."

But this link between fault and liability produces bilateral consequences. If fault is the measure of liability, then when a victim has himself taken part in his own damage, how can one justify not leaving to him a corresponding portion of his prejudice?

If the tortfeasor had to pay this portion, it would be unjust. Justice demands that one pay what one owes, all that one owes, but only what one owes.

This principle, as old as the law, has constituted to our times a sort of "fundamental principle" of liability.

It is nonetheless put into question by the evolution of modern society.

This evolution, which has taken the character of an upheaval, has had basically two causes: the emergence of a technique and a change in mind-set.

1.—The new technique is that of insurance, and by its widespread use, it has played a fundamental role. It has radically transformed the fate of the civilly liable. In civil terms, . . . however great may be the gravity of the fault or the magnitude of the damage, it is no longer the author of the accident who personally bears its consequences. In every case, the party found liable risks financially but a momentary and forfeitary increase in his insurance premium. His daily life will not even be disturbed by the legal sequel of the accident, for in general the insurer provides for his defense. One therefore notes, on the side of the authors [of the accidents], a general leveling of situations into a kind of rationalized comfort.

On the side of the victims, on the other hand, essentially nothing has changed. To be sure, he who has lost an arm or an eye is certain to receive compensation, but he remains without the arm or without the eye. When he hasn't lost his life[].

The disequilibrium that has thus appeared in the respective situations of the tortfeasors and the victims has often been noted by liability specialists. See, in particular, on this subject, the strong remarks of Professor Tunc

2.—This change in situations has led to a modification of sensibilities.

Since the tortfeasor is practically no longer affected by the consequences of his act, and since the insurer assuredly is no more so (because he adjusts premiums according to risks), attention now focuses on the victim. And in a world dominated notably by the values—sometimes contradictory—of individual happiness and social solidarity, our contemporaries have a tendency to sympathize more with the fate of the victims and to wish that they receive a more complete reparation, even if, by their own failure, they may have contributed to their own damage.

It is up to us to take account of this fundamental upheaval of the traditional premises of the problem of liability, and we are in a position, as technicians, to seize its exact measure.

1.—Because, in our current society . . . , accidents have multiplied to the point of becoming a national plague, and the courts have been brought, under your control, in order to assure insofar as possible the reparation of damages, to measure fault in an increasingly rigorous fashion. So that now, what is required of each of us is to behave not only as "a good family father," but as a perfect man. The judge measures human conduct in terms of an abstract ideal, and what incurs liability is, finally, a lack of perfection.

A criterion that leaves the tortfeasor indifferent (and we have seen why), but that turns against the victim.

....
And [against] all victims—children, the aged, people more or less handicapped—because the *jurisprudence* is such that one does not ask whether it was actually possible for them to attain the required behavioral ideal.

Thus a slight fault, in the abstract, of the victim, weighed against a similar fault of the author, will lead to the cutting in half of the liability. So that if, for example, the prejudice to the victim is of 100,000 francs, he will receive but half of this sum. His fault will have thus cost 50,000 francs, while that of the tortfeasor, while equal, will remain for him practically devoid of monetary consequences[].

2.—This disparity is all the more shocking in that the penalty that thus strikes the victim because of his fault is in general out of all relation to the severity of the fault.

....
Is it just, in these conditions, to deprive the victim of a portion of his reparation because of his fault?

One could so argue in days of old, when the author [of the accident] was on the same plane as the victim and had to assume, personally and materially, the consequences of his act. It was normal, then, that each bear the weight of his failures. But in our times, the ancient equilibrium has been broken: The author is no longer penalized for his conduct.

Why should the victim remain so?

The preceding considerations are of general value. But they are obviously destined to remain without practical consequence, on the level of *jurisprudence*, in the area of liability for fault per se, governed by C. CIV. arts. 1382, 1383. The principles being what they are, it does not appear possible to put aside the traditional solutions.

But such is not the case for liability for the acts of objects, such as has been organized by the *jurisprudence* based on Article 1384(1).

1.—I will not attempt to settle here the theoretical debate, opened half a century ago and not yet closed, concerning the nature of this liability.

It has, as you know, divided the best minds, some maintaining that the system of liability that flows from the famous decision rendered by the Plenary Assembly [of the Cour de cassation] in the *Jand'heur* case of 13 Feb. 1930, remains finally founded on fault, because there has been "fault in the custodianship" [citation to a French legal treatise], others maintaining to the contrary that, since it excludes the search for fault, the system presents a purely objective character.

This latter thesis is obviously very favorable to the demonstration that I intend to conduct. Mrs. Lambert-Faivre exactly perceived, from the point of view that interests us, its logical implications:

... "It is up to the Cour de cassation to go to the end of this evolution by consecrating, in traffic cases, the principle of objective and causal liability, to which the only exception would be external causes having the character of *force majeure* and marking the rupture of the causal link." ...

Those of you won over to the idea of the objective character of liability under Article 1384(1) will be convinced by this reasoning alone.

Others perhaps will require, like me, further arguments.

....

I therefore think, insofar as I am concerned, that it is better to stay away from rigid statements on the nature of liability under Article 1384(1). If one wishes to grasp closely the realities, and also by consequence the language, it would be appropriate, it seems to me, to say that [it has both objective and subjective elements].

2.—In reality, what is essential in the system descended from the dispositions of Article 1384(1), what differentiates it fundamentally, is that it places on the custodian a “presumption of liability.”

And this presumption offers an immense and double advantage for the victim: it reverses to his benefit the burden of proof, and it does so with great force, because the custodian can only free himself of it by proving that the damage was in reality due to an act of *force majeure*, both unforeseeable and unavoidable.

Such is, in its original purity, the *doctrine* of the *Jand'heur* decision.

....

But very rapidly, . . . under the influence of that old and profound idea that fault must be the measure of liability, another *jurisprudence* manifested itself—which has not been without twists and turns and detours, but which progressively imposed itself—according to which the fault of the victim, even if foreseeable or avoidable, was of a nature to exonerate partially the custodian of his liability.

So that of the two advantages for victims resulting from the 1930 decision, only the first subsisted (the shift of the burden of proof), the second disappearing to be replaced, as in ordinary matters, by a sharing of liability between tortfeasor and victim

3.—This situation worsened, starting in 1961, due to a series of decisions of the Second Civil Chamber, which then declared partially exoneratory the [faultless] act of the victim, when it does not present the characteristics of unforeseeability and unavoidability.

This rule was certainly erroneous, and I have been waiting for an occasion to ask you to abandon it.

....

I know perfectly well that at that time the Cour was under the influence of the doctrine of the *Lamoricière* decision, . . . which admitted the possibility of the tortfeasor's partial exoneration by an external event (in that case, a storm). But when, in 1970, . . . the Second Chamber revisited this *jurisprudence*, the rule of partial exoneration by the [faultless] act of the victim fell of its own and should logically have been abandoned.

4.—As for [an approach permitting] the partial exoneration of the tortfeasor by the negligence of the victim, one must recognize that, in the purely rational order, nothing requires its abandonment.

It would only be otherwise if the system of liability under Article 1384(1) could be considered as purely objective in nature, entirely independent of the idea of fault.

But although, in my opinion, the rule in question is not logically condemned by the current system, it is equally true, on the other hand, that this system does not necessarily imply it either.

It [the rule in question] could just as well have been imposed as not. That depended on the force that one intended to confer on the presumption of liability weighing on the custodian of the object.

In the beginning, the proof of an act of *force majeure* was required in every case. Later—motivated by the idea, which was then profoundly just, that the victim must, like the author, bear the burden of his faults—the Cour de cassation relaxed its initial rigor and admitted partial exoneration.

But the traditional premises have been overturned, so that this solution finds itself essentially deprived of its initial justification, while new moral demands make its suppression appear desirable.

In short, the rule in question was formulated in another era for reasons of equity, and paradoxically, it is today for reasons of equity that it would be appropriate, it seems to me, to revoke it.

By so doing, you would illustrate by way of a remarkable example the regulatory function of the Supreme Cour.

It is important however to ask preliminarily whether, alongside the advantages to be derived from this reversal of *jurisprudence*, there might not also result certain inconveniences that would detract from it.

1.—It is certain that the envisaged change would engender a disparity of treatment among victims, depending on whether Article 1384(1) or 1382 is applied to them.

....

And in any case, it is not because it is impossible, in one decision, to advance all of liability law that you must abstain from improving it, without further delay, insofar as it is in your power to do so.

You may also be in a position to facilitate the work of the legislator.

2.—The total indemnification of the victim, even in the case of fault on his part, is rendered possible thanks to insurance, which, besides, has become largely obligatory, especially for motor vehicles.

But cases will arise where, insurance being optional, the author of a damage will not be insured and where, therefore, the old situation will persist.

Cases of this sort should become increasingly rare, not only because coverage for civil liability is becoming more widespread, but also because insurance companies now tend to include this risk automatically in their fire policies.

Besides, to the extent that the courts should find themselves confronted by painful situations, because of the lack of insurance, they would be free, if not to split the liability [between author and victim], to adjust according to equity the damages imposed on the author.

3.—The total indemnification of victims would obviously lead to an increase in the costs of insurance companies, and thus to a generalized rise in premiums.

It is difficult to measure the effort of solidarity that would thus be asked of most of our fellow citizens. If it should appear excessive, it will be up to the legislator to intervene.

I consider, insofar as I am concerned, that it is not possible for us, given the state of things, confronted by the knowledge of the unjust consequences of a rule of *jurisprudence*, to allow this rule to subsist.

One can also note that the supplementary sums paid by the insurers would, in large part, be recuperated by the national health care system.

4.—The adoption of the new rule would necessarily lead to the decline of certain subsidiary [judicial] solutions

. . . .
No objection could be raised against abandoning these two *jurisprudences*, which would be the logical consequence of the newly established rule and which would also serve the interests of victims.

It would represent, furthermore, a significant simplification of liability law.

One must well recognize, on this level, that the suppression of the comparative negligence rule would have a considerable impact. This would be—besides the interest of justice, which is alone decisive—one of the major advantages of the desired overturning of the *jurisprudence*.

All sharing of liability having been eliminated, the interminable discussions of lawyers on this question would be eliminated in one shot. The debates would be clarified and simplified, the procedure disencumbered and expedited.

Dean Carbonnier perceived very well the unpleasant consequences engendered by the case law's comparative negligence rule: [Carbonnier laments the loss of "quasi-automatic functioning" of tort cases after the *Jand'heur* decision's introduction of the comparative negligence rule.]

Well, sirs! Remove the comparative negligence rule and you will realize the rare alliance of justice and efficacy!²⁷¹

This argument contains virtually every element characteristic of unofficial French judicial discourse, including controversy within *doctrine*, detailed analysis of the norms of *jurisprudence*, equity considerations, legal adaptation arguments, institutional competence discussions, social and economic policy considerations, and highly personalized expression. Dawson's criticisms of the French judicial system seem less convincing in the face of such an example.

Let us begin this final analysis by examining the interpretive method of Charbonnier, the author of the above *conclusions*. He starts his argument by

271. *Conclusions* of Advocate General Charbonnier, Judgment of July 21, 1982, Cass. civ. 2e, 1982 D.S. Jur. 449–52 (citations omitted).

stating that “[t]he judges had, in this affair, to apply a classic text [Article 1384(1) of the Civil Code] to a situation that is no less classic.”²⁷² Such a statement is consistent with the official portrait’s depiction of grammatical judicial interpretation; the judge applies a given text of the Code. Charbonnier’s argument, however, offers little pretense of the Code’s analytic centrality. The text of Article 1384(1) is never seriously discussed, much less quoted. The interpretive discussion does not turn on the application of the Code provision, but on whether or not a particular judicial rule should be maintained. Charbonnier emphasizes the judicial origin of the rule; it is a rule of *jurisprudence*, descended from a long line of judicial decisions dating back to the 1930 *Jand’heur* decision.

The parameters thus established imply the abandonment of the traditional grammar of the official French portrait; the formally controlling text has been entirely displaced by judicial norms. It is no longer the Code that generates the judicial solution. Furthermore, the mere existence of a controlling rule of *jurisprudence* signifies the failure of the grammar of the Code. If the grammar of the Code were functioning, there would be no room—never mind the need—for a judicial rule to be established in the first place. In order for the judiciary to interpose a rule of *jurisprudence* between the Code and the solution, grammar must have been perceived to have failed to generate a required interpretive path. Thus, Charbonnier states that the judicial rule “could just as well have been imposed as not.”²⁷³

The interpretive method of Charbonnier’s *conclusions* places itself on the hermeneutic plane. Charbonnier seeks to arrive at a meaningful judicial solution on the basis of considerations that, though external to the grammar of the Code, are deemed pertinent to the resolution of the case. In this search, there is much room for discussion about *why* a given judicial position should be adopted.²⁷⁴

Charbonnier’s *conclusions* therefore presents a plethora of policy arguments. He advances social policy arguments,²⁷⁵ economic policy arguments,²⁷⁶ administrative efficiency arguments,²⁷⁷ and, of course, institutional arguments. The last are of particular importance; they reflect

272. *Id.*

273. *Id.*; see also unpublished *conclusions* (on file with author) (“[Article 511] authorizes several approaches that—why hide it?—divide [the Chambers of] our Supreme Cour . . .”).

274. Charbonnier discusses, *inter alia*, the evolution of modern society, the effects of insurance, the shocking inequities of these effects, the doctrine of the *Jand’heur* decision, the justification of given jurisprudential rules, the social, economic, and legal effects produced by the adoption of different judicial norms, and the change in the mind-set of contemporaries. *Conclusions* of Charbonnier, *supra* note 271, at 449–51.

275. *Id.* at 450 (noting that “social solidarity” should protect victims of accidents, regardless of victims’ fault).

276. *Id.* (noting that total indemnification of victims will increase costs of insurance companies, and thus cost of premiums, but will decrease costs of social security, which in France includes nationalized health care).

277. *Id.* (noting that new rule would, for instance, “disencumber and expedite” legal procedure).

directly on the perceived role of the judiciary. Charbonnier's *conclusions* offers, on the issue of institutional competence, several arguments. The most explicit is that judges possess the power to posit normative rules, to establish doctrines, and to change them.²⁷⁸ To Charbonnier, the normative power of the French civil judge is an absolute given.

Charbonnier debates whether judges should exercise that power in this particular case, and he answers affirmatively.²⁷⁹ It is up to French judges to adapt the law to the evolution of modern society, even if, in this particular case, such judicial adaptation only concerns a portion of liability law. As so conceived, the sphere of appropriate judicial action is hardly distinct from that of the legislator.²⁸⁰ The judge and the legislator are clearly operating in closely related spheres; the judge establishes new rules, but the legislature can build upon or overturn them. The normative power of the civil judge, as understood by Charbonnier, is enormous: He can establish judicial rules that will cover all future cases in a given legal field.²⁸¹

Charbonnier's consideration of the impact of his proposed new rule of *jurisprudence* is a discursive maneuver permitting him to turn to practical economic and social "realities," rather than focusing on the controlling legal text. He therefore discusses the pecuniary effects of applying the old rule.²⁸² Implicit in this discursive stance is a critique of "abstract" and "formalist" reading, which limits itself to purely textual analysis. The problem is that "[t]he judge measures human conduct in terms of an abstract ideal."²⁸³ To Charbonnier, if one were "to grasp closely the realities," one would also, "by consequence," grasp "the language."²⁸⁴

Charbonnier's focus on impact and "realities" displaces the controlling legal text²⁸⁵ on the basis of a critique of abstract reading, and opens the requisite textual space for the ensuing policy analysis. The *conclusions* thus constructs an interpretive framework in which the role of the French civil judge has been profoundly modified. The judge is now in a position to adopt a new, sweeping, and overtly programmatic stance on the basis of its advantages and inconveniences. In this new interpretive construct, French

278. *Id.* at 449 ("[B]ecause in this case the principle is one of *jurisprudence*, because it is you who established it, you are the masters of it and you can change it.").

279. *Id.* at 450 ("It is up to us to take account of this fundamental upheaval of the traditional premises of the problem of liability, and we are in a position, as technicians, to seize its exact measure.").

280. Charbonnier argues that establishing a new judicial rule, though it would only affect a portion of liability law, might "facilitate the work of the legislator." If its economic effects "should appear excessive, it will be up to the legislator to intervene." *Id.* at 451-52.

281. *Id.* at 452 (arguing that "the considerable impact" of new judicial stance would actually constitute "one of its major advantages").

282. *Id.* at 450 (noting that fault of some poor victim will "cost him 50,000 francs" in reparations; "children, the aged, [and] people more or less handicapped" face similar perils).

283. *Id.*

284. *Id.* at 451.

285. One could argue about which text is actually controlling at this point: Is it still Article 1384(1), or is it *jurisprudence*'s comparative negligence rule?

magistrats, arguing among themselves, can actually “question the value, fundamentally, of [the solution suggested by the logic of the textual ‘principles’].”²⁸⁶ There can be little doubt as to the hermeneutic nature of such a statement. The “value” can only be measured in terms external to the Code, be they philosophical, sociological, economic, or political in nature.

In this hermeneutic framework, the French civil judge is no longer the passive agent who merely applies the grammar of the Code. He is an active agent intercalated between the Code and the “appropriate” or “desirable”—to use Charbonnier’s terms—judicial solution. He can be “won over” to one or another of *doctrine*’s positions, and can be “convinced,” via policy argumentation, to *act*. “[B]ecause in this case the principle is one of *jurisprudence*, because it is you who established it, *you are the masters of it and you can change it*. . . . *It is up to us* to take account of this fundamental upheaval of the traditional premises of the problem of liability.”²⁸⁷

Charbonnier’s argument seeks to force the judges of the Cour to recognize—and take responsibility for—the consequences of their past and present interpretations, of their rules of *jurisprudence*. His language personally implicates the judges. Enough of the “ventriloquism” of which Dawson correctly speaks;²⁸⁸ the judge is not merely the passive mouth of the statutory law. Charbonnier invites his fellow *magistrats* to join him in the first-person singular.²⁸⁹

The judges of the Cour were apparently receptive to Charbonnier’s *conclusions*. They overturned their *jurisprudence*, albeit in the traditional manner. After describing the facts and procedural history of the case, the Cour states in its official decision:

[W]hereas only an event constituting a case of *force majeure* exonerates the custodian of an object, instrument of the damage, of the liability borne by him by virtue of the application of Article 1384(1) of the Civil Code; whereas, consequently, the conduct of the victim, if it was not unforeseeable and unavoidable for the custodian, cannot exonerate him, even partially; whereas [the victim’s conduct here was neither unforeseeable nor such as to result inevitably in the accident];

On these grounds, rejects the appeal²⁹⁰

286. *Conclusions* of Charbonnier, *supra* note 271, at 450.

287. *Id.* at 449–50 (emphases added); *see also id.* at 452 (“I consider, insofar as I am concerned, that it is not possible for us, given the state of things, confronted by the knowledge of the unjust consequences of a rule of *jurisprudence*, to allow this rule to subsist.”).

288. *See supra* text accompanying note 28.

289. “My speech is clear, undoubtedly a little rough, direct; [it] doesn’t wrap itself up in padded terms which make of Justice—and it’s a mistake to do so—a world apart.” Unpublished *conclusions* (on file with author). The move to the first person singular, which both empowers and relativizes the judge, is related to the switch to hermeneutic reading: It marks the breaking of the textual insularity of the law.

290. Judgment of July 21, 1982, Cass. civ. 2e, 1982 D.S. Jur. at 452.

The official portrait of the French civil judge is carefully maintained: The decision conveys the classic image of the passive French judge, mechanically applying the grammar of the Code. Only someone already familiar with the internal discourse of the French judicial system would recognize the elaborate hermeneutics that went into those two simple words: "even partially."

V. THE RELATION BETWEEN THE OFFICIAL AND UNOFFICIAL PORTRAITS

This analysis of French judicial discourse suggests several conclusions. The first is that while Dawson's influential analysis of the French civil judicial system is highly suggestive, it is nonetheless misleading, if not incorrect. The rigid, formalist conception of adjudication, which Dawson describes so well—and which I have termed the "official French portrait" of the civil judge—does not dominate the French civil law system.

This conclusion hinges on an examination of the various elements that constitute the unofficial French portrait: French academic *doctrine*, the *conclusions* of the advocates general, and the *rappports* of the reporting judges. Even the most cursory analysis of these sources reveals the existence of a vibrant and contested institutional and discursive sphere in which French academics and judicial *magistrats* seek to produce coherent policy-based judicial responses to contemporary legal problems. In this sphere, the French civil *magistrat* deemphasizes the formal wording of statutory law and engages instead in policy analysis. In this discursive mode, the French judge bases her legal reasoning and conclusions on, *inter alia*, social and economic policy considerations, institutional competence issues, and equity arguments. In this hermeneutic framework, the French judge deliberately establishes judicial norms or rules of *jurisprudence*.

It would be incorrect, however, to conclude that the "unofficial portrait"—though behind the scenes—is what "really" dominates the French civil judicial system.²⁹¹ This Article demonstrates that the unofficial portrait's discourse of policy hermeneutics has not simply replaced the formalism of the official portrait. The discourse of grammar continues to be maintained, both in the syllogistic official judicial decision and in certain portions of *conclusions* and *rappports*. Thus, the official portrait of the French civil judge—who

291. The French civil judge is *not* simply a duplicitous character who craftily masks his lawmaking behind the convenient façade offered by the official French portrait. Cf. DAWSON, *supra* note 2, at 431 (suggesting such a conclusion); MERRYMAN, *supra* note 7, at 47–48, 151 (same). Similarly, the reality goes beyond a historical narrative seeking to mirror the now-canonical history of American legal theory, as described, for instance, by Roberto Unger. See, e.g., ROBERTO M. UNGER, KNOWLEDGE AND POLITICS 92–97 (1975). It would be, after all, quite easy to describe the trajectory of French legal consciousness as mirroring its American counterpart. In France, this easy historical narrative would trace an evolution from the 19th-century formalism of the School of Exegesis, to the early 20th-century analytic and realist critique of "free scientific research" (Gény), to contemporary policy orientation (Carbonnier, Tunc). Such a narrative would tend to suggest, in direct contradiction to the analysis conducted in this Article, that an era of purely grammatical reading has been supplanted by an equally pure hermeneutic one.

passively, mechanically, almost mathematically applies the generative matrix of the controlling legal text—still exists, and it continues to hold a central position in the French civil judicial system. This official portrait continues to be far too carefully maintained to be dismissed as mere window dressing. It is the result, as Dawson points out, of the French Revolution's defining historical and cultural influence. Because of the deep cultural distrust of the judiciary, and the resulting establishment of certain rigid constraints, the French judicial opinion took, and continues to take, its prototypically grammatical form.

The second conclusion is that the form of the official French judicial opinion, which resists the overt introduction of hermeneutics, has led to the bifurcation of French judicial discourse. The official French judicial decision thus maintains its grammatical discourse, and hermeneutic discourse surfaces elsewhere (in the *rapports*, *conclusions*, and *doctrine*).²⁹² Neither discourse, in and of itself, independently of the other, represents "what is really going on" in the French civil judicial system. The bifurcation of French judicial discourse into distinct spheres thus represents the French judicial system's mediation between, on the one hand, France's historically and culturally determined distrust of the judiciary, and on the other, the post-Gény impulse towards socially responsive judicial hermeneutics. Both directives remain simultaneously operative.

The third conclusion is that the French judicial system's discursive split produces certain paradoxical and heretofore unnoticed effects. In particular, the insistence on grammar results in an increased sensitivity to its perceived failures. This sensitivity manifests itself in the discourse of the unofficial portrait, which, as we have seen, is remarkably candid about perceived gaps, conflicts, or ambiguities in the Code.

The discussion of perceived legislative flaws results in the questioning, in unofficial judicial discourse, of how to "construct a solution." The French *magistrat* faced with a perceived legislative lacuna, for example, therefore draws upon sources explicitly identified as external to the statutory law, such as *doctrine*²⁹³ and *jurisprudence*. The result is that the unofficial judicial

292. I do not, by any means, intend to suggest that French judicial decisions are purely grammatical, nor that *rapports*, *conclusions*, and *doctrine* are purely hermeneutic. I only mean to say that insofar as overtly hermeneutic discourse surfaces in the French legal system, it does so in the *rapports*, *conclusions*, and *doctrine*.

293. Hence the exalted status of the law professor in the French legal system. Antoine Garapon speaks of the French legal system's veritable "cult of professors." Interview with Antoine Garapon, Director of the Institut des Hautes Etudes sur la Justice, in Paris, France (Mar. 1994). Merryman describes "the teacher-scholar" as "the real protagonist of the civil law tradition." MERRYMAN, *supra* note 7, at 59–60. The writings of Gény, Carbonnier, and Tunc are therefore essential to an understanding of the French judicial system. These three professors are constantly cited within the unofficial discourse of the French *magistrat*, as are the specialists of given legal fields. Other than the reference to such professors within the space of French *magistrats'* unofficial discourse, the exalted status of the law professor manifests itself in another way. I refer here to the institution of the "doctrinal note," which represents the French equivalent of American law-review case comments. The major difference, other than the fact that they are produced by

construction of a solution occurs in an explicitly embattled field. The *rapport* or *conclusions* almost invariably presents some controversy of either *doctrine* or *jurisprudence*. Professor X's opinion, for example, which criticizes the First Chamber's solution, is presented as conflicting with Professor Y's. In short, once the French *magistrat* considers that the grammar of the Code does not generate a required outcome, she finds herself in a contested hermeneutic field where she must choose among the various conflicting positions. She must partake in the open legal debate and speaks as a subjective individual, arguing in favor of the adoption of one position among many. In her unofficial discourse, the French civil judge is highly personalized, and is less than confident in the ability of hermeneutics (especially policy hermeneutics) to generate required interpretive solutions. She routinely emerges as an "I" who argues to her colleagues, now personalized as "you." Her arguments, now presented as offering nothing more than her personal opinion, are littered with subjective phrases such as "it seems to me," or "insofar as I am concerned."

The bifurcation of French civil judicial discourse has thus resulted in the coexistence of two remarkably different discursive spheres. How can such different spheres coexist without one dominating the other? Framed in other terms: Unless the official portrait is mere window dressing, how can the French judiciary rationalize what it does in its unofficial discursive sphere? Is the French judiciary simply blind to the apparent conflicts between the policy hermeneutics in which it engages in its unofficial discourse and the perfectly passive, grammatical application that is dictated by the official portrait of the French civil judge?

French civil judges are not blind to this tension. The fourth conclusion is that the French legal system has constructed a series of basic mediating concepts that facilitate, explain, rationalize, and justify the coexistence of the official and unofficial portraits of the role of the French civil judge. These fundamental mediating concepts have emerged as the primary concerns of French academic *doctrine* since the publication of Gén'y's devastating critique of nineteenth-century French formalism, and as the recurrent issues in unofficial French judicial discourse.

The sources of the law, the endless preoccupation of French academic *doctrine*, is one such mediating concept. It represents an uneasy compromise between the official portrait and the critiques that contemporary French academics have leveled against that portrait. It recognizes the creative role played by the French civil judiciary, while simultaneously denying the resulting judicial norms the status of "Law." Judges create judicial norms (especially when a case demonstrates the existence of a legislative gap) that in

major academics, is that they are published immediately after important judicial decisions in the law reports themselves. The American equivalent would be for the West Reports to publish, immediately following a Supreme Court decision, an analysis by Professor X.

fact function as if they were Law, but that does not mean that these judicial norms are Law. Only the legislature can create Law, so judicial decisions cannot, by definition, be a source of the Law. Hence *jurisprudence* can only function—to use Gén \acute y's term, as taken up once again by Carbonnier—as a mere “authority.”

The debate over the sources of the law thus operates as a mediating concept that rationalizes the hermeneutic activity of the judge in the unofficial discursive sphere, while salvaging as much as possible of the official French conception of the grammatically oriented code system. The treatment of the sources of the law posits a status relation between the official and unofficial judicial discourses that denies the unofficial judicial discourse the status of Law, but in so doing permits and justifies its very existence. The official portrait of the French civil judge, which might have been challenged by the creative policy hermeneutics of the civil judge, is thus maintained and justified as well.

Several of the recurrent argumentative modes characteristic of French *conclusions* and *rapports* function as similar concepts that mediate between the official and unofficial portraits of the role of the French civil judge. The concept of legal adaptation or modernization, for example, necessarily thrusts the civil judge into a hermeneutic mode of reading in which she must produce interpretations of the law that are meaningful to a changing society. This is not surprising; the point of such calls for “modernizing” interpretations is to get away from grammatical or formalist applications of the law, which are perceived to be socially unresponsive. Such modernizing interpretations of the law, however, leave the literal wording of the statutory law intact. After all, when the Cour de cassation adapts or modernizes its reading of Article X of the Civil Code, Article X remains formally unchanged. This permits the French judge to perform hermeneutic interpretations of the statutory law without explicitly threatening the formal grammar of the Code. The French civil judge can interpret creatively on the basis of policy hermeneutics, yet the statutory law can still be seen as controlling the judge's decisions.²⁹⁴

In the French civil judicial system, the concept of equity functions in a similar manner. On the one hand, equity posits that the judge and the law serve some sort of social function (however vaguely defined). It thus calls for the judge to produce meaningful, hermeneutic readings in terms of the “social reality” that exists “outside” of the statutory law. On the other hand, as is the case with judicial modernization of the law, the statutory law itself remains formally unchanged and relatively unthreatened. Equity does not imply that the

294. Although it may appear paradoxical to the common law jurist, French academics have therefore frequently praised the flexibility or “suppleness” of their codified legal system. See, e.g., Jean Boulanger, *Notations sur le pouvoir créateur de la jurisprudence civile*, 59 REVUE TRIMESTRIELLE DE DROIT CIVIL [R. TRIM. D. CIV.] 417 (1961); Adh \acute mar Esmein, *La jurisprudence et la doctrine*, 1 R. TRIM. D. CIV. 5, 12 (1902).

statutory law in general, or the particular article of statutory law in question, or even the grammatical application of the statutory law should always be discarded. To the contrary, it only implies that on certain, relatively rare occasions the statutory law should be read in a different manner in order to avoid absurd or unjust judicial solutions. The concept of equity marginalizes these relatively rare, aberrant cases that equity itself corrects. By negative inference, not only does the great mass of formally applied statutory law subsist unchanged, but it finds itself justified as well.

In the French civil judicial system, the mediation between passive grammatical application and socially responsive, hermeneutic interpretation of the statutory law takes a physical incarnation as well, in the form of the advocate general. The role of the advocate general is to ensure the proper application of the statutory law and to pursue society's interest in the public welfare.²⁹⁵ The advocate general's mediating position between the legal case and society at large, as well as between the judges and the parties, manifests itself procedurally. An advocate general presents his *conclusions* after the parties have argued their respective positions and before the judges retire for deliberations. He is a *magistrat* who has access to the *rapport*, but who does not partake in the judicial deliberations or voting. The advocate general therefore functions as the institutional and physical manifestation, in the French judicial system, of the mediation between the formal grammar of "proper application of the statutory law" and the hermeneutic of "public welfare."

The advocates general are not only aware of their double duties, but also appear to be quite conscious of their role as mediator between them. In an article on the role of the advocates general at the Cour de cassation, for example, Advocate General Charbonnier begins by stressing their "social dimension": Advocates general are "the representatives of the social interest. They have especially as their role . . . to ensure that a certain dimension of justice be respected, namely its social dimension. . . . According to a formula that is as true as it is hackneyed, they defend society."²⁹⁶ Charbonnier then offers the mediating twist: Advocates general "defend [society] by defending the statutory law. This law represents, by definition, the interest of all, and the advocate general himself represents this interest as well."²⁹⁷ The mediation is straightforward: The advocate general defends the social interest by defending the statutory law.

According to Charbonnier, by ensuring that the statutory law is correctly applied in instances where it is clear, and correctly interpreted in instances where it is ambiguous, the advocate general fulfills his "high mission of [promoting] the general interest."²⁹⁸ It is through him that "the interpretation

295. See *supra* part IV.B.1.

296. Lucien Charbonnier, *Ministère public et Cour suprême*, in 1989 ANN. REP. 127, 128 (1990).

297. *Id.* at 129.

298. *Id.*

of the statutory law” and the “combination of rules of law” are fixed; “it is through him that *jurisprudence* is elaborated.”²⁹⁹ It is he who helps the Cour de cassation in its ever-increasing role as “paralegislator.”³⁰⁰ On the one hand, the advocate general’s mode of interpretation appears to be patently hermeneutic: He must attempt “to bring out the[] meaning” of legislative provisions, taking into account “the social and economic realities”; and he must seek “to arrive at a better perception of the practical effects” of the proposed solutions of *jurisprudence*.³⁰¹ On the other hand, the role of the advocate general, argues Charbonnier, is to ensure that the Cour properly exercises, via the judicial syllogism, the deductive reasoning of the geometrician; it is by the logical operation of legal principles that justice is assured.³⁰² Formal grammar and social hermeneutics therefore combine in the advocate general. As Charbonnier states, in a sentence that demonstrates the full extent of the mediation: “[The advocate general’s] domain is that of the fundamental realities, that is to say, [legal] principles.”³⁰³

The conclusion to be drawn is *not* that the French civil judicial system maintains two apparently contradictory modes of reading—and thus two apparently contradictory portraits of the judicial role—that are separated into different, perfectly pure discursive spheres, and that these contradictions are mediated by some basic concepts and institutions. The fifth conclusion is that while the French civil judicial system maintains two distinct modes of reading, the two are completely interdependent, constantly leaking into each other and at no point pure.

Traces of policy hermeneutics in the apparently pure, grammatical discourse of the official French judicial decision unquestionably exist. Given the bifurcation of French judicial discourse, however, they can be difficult to recognize. The Cour’s decision in the comparative negligence case offers a fine example.³⁰⁴ The Cour’s official decision states: “[W]hereas, consequently, the conduct of the victim, if it was not unforeseeable and unavoidable for the custodian, cannot exonerate him, *even partially*.”³⁰⁵ The simple inclusion of the words “even partially” in the prototypically formal discourse of the Cour’s decision represents not only the Cour’s rejection of its own comparative negligence rule, but also the trace of an entire discursive sphere in which French judges interpret on the basis of elaborate policy hermeneutics. The two words, “even partially,” represent a gateway of enormous proportions; those two words permit the incursion—however encoded it may be—of social,

299. *Id.* at 133.

300. *Id.* at 131.

301. *Id.* at 134.

302. *Id.* at 137, 139.

303. *Id.* at 141.

304. *See supra* part IV.D.

305. *Conclusions* of Charbonnier, *supra* note 271, at 452 (emphasis added).

economic, and institutional policy arguments, as well as of equity and legal adaptation considerations.

The Cour's decision in the case regarding palimony for "natural" and "adulterine" children offers a similar example.³⁰⁶ The Cour states, as the basis of its decision, "Given Article 342(2) of the Civil Code;—Whereas the palimony action foreseen by this text can only be entertained if brought by a *natural*, adulterine or incestuous child,"³⁰⁷ despite the fact that Article 342, at the time of the suit, said nothing at all about "natural" children. The inclusion of the word "natural" represents the trace, in the grammatical discourse of the official French judicial decision, of the French judiciary's unofficial hermeneutics.

The incursion of hermeneutics into the grammar of the judicial decision arguably represents the most significant moment of the French civil judicial decision. The answer to the question "What are the holdings of the two cases we have just been discussing?" would have to include the words "even partially" and "natural child." The formal grammar of the official French judicial decision is thus quite dependent on the French judiciary's unofficial policy hermeneutics.

The French judicial system's unofficial discourse is similarly dependent on formal grammar. This dependence manifests itself on two levels. First, the French judge tends to seek recourse to hermeneutic reading only when he faces a perceived gap, conflict, or ambiguity in the grammar of the statutory law. The presumption remains that most of the time the statutory law can simply be "applied" grammatically. The exercise of judicial policy hermeneutics is perceived to be entirely dependent on the breakdown of formal grammar.

The second level in which the unofficial discourse depends on grammar involves the return of formalist grammar after the turn to policy hermeneutics. French unofficial discourse does not remain purely hermeneutic once it is deployed. To the contrary, the turn to hermeneutics precipitates the production of formal judicial norms. The *rapport* in the wrongful death case involving the concubine, for instance, methodically presents the applicable judicial norms.³⁰⁸ "The Second Civil Chamber *requires*," Justice Combaldieu states, "according to the well-known formulation, 'violation of a legally protected, legitimate interest.'"³⁰⁹ The rhetoric that accompanies the presentation of such "required" judicial norms is that of formalist, grammatical reading. In the *conclusions* and *rapports*, it is almost always a question of "applying" the relevant rule, principle, or solution of *jurisprudence*.³¹⁰

306. See *supra* text accompanying notes 223–25.

307. *Conclusions* of Lindon, *supra* note 205, at 432 (emphasis added).

308. See *supra* text accompanying notes 160–62.

309. *Rapport* of Combaldieu, *supra* note 160, at 184, 186 (emphasis added).

310. See *supra* part IV.C.2.b.

The turn to judicial hermeneutics thus eventually leads to the production of formal judicial norms that are accompanied by the rhetoric of grammatical "application." These formal judicial norms, just like the formal statutory laws that they have displaced, will also be read both grammatically and hermeneutically, hence the modification and overturning of *jurisprudence* on the basis of equity and policy considerations, legal adaptation arguments, and the like. The hermeneutics of unofficial French judicial discourse thus reveals itself to be quite dependent on formal grammar, which is, itself, dependent on hermeneutics.

The interdependence of grammar and hermeneutics is perhaps most explicit in the expression "the *doctrine* of the Cour." On the one hand, the expression retains its traditional connotation of "academic *doctrine*," thus implying subjective, hermeneutic reading on the basis of sociopolitical theories. On the other hand, the expression now possesses the relatively new meaning of "judicial doctrine," implying the grammatical application of formal and authoritative judicial norms.

The irony of this interdependence of grammar and hermeneutics is that formal grammar (judicial doctrine) surfaces in the discursive sphere of the unofficial portrait (the explicitly hermeneutic sphere of judicial-style "academic *doctrine*") because it was perceived to have failed in the discursive sphere of the official portrait (the explicitly grammatical sphere of the judicial "application" of the formal dictates of the statutory law). The production of formal judicial norms, which is explicitly forbidden by the grammar of the official French portrait of the judicial role, is precisely what permits the return of formal grammar in the French judicial system.

The cycle of the French civil judicial system can be summed up in the following sequence: (i) formal grammar of the statutory law; (ii) the perceived breakdown of the statutory law's formal grammar; (iii) the turn to policy hermeneutics in order to fix the breakdown; (iv) the return of grammar as formal judicial norms; (v) the perceived breakdown of the formal grammar of the judicial norms; and (vi) the turn to policy hermeneutics in order to fix the breakdown, and so on. Grammar is salvaged and reproduced by hermeneutics, which itself exists because of the perceived failure of grammar.

VI. CONCLUSION

The French civil judicial system offers two portraits of the judicial role. The official portrait is produced by legislative provisions, judicial interpretation and application of these provisions, and the formal structure of the French judicial decision. It presents the judge as grammatically applying the statutory law. The unofficial portrait is produced by *doctrine* and the argumentation of *magistrats*. It presents the judge as producing socially meaningful responses to current legal problems on the basis of policy hermeneutics.

In fact, the bifurcated discourse of the French civil judicial system consists of a perpetual intermixing of grammar and hermeneutics. The fundamental mediating concepts such as the sources of the law, legal adaptation, or equity do not mediate between two contradictory modes of reading. Rather, they merely facilitate the coexistence and imbrication of two modes of reading (represented by two modes of discourse) that do not—and perhaps cannot—exist independently of each other. The French judicial system has apparently found that it cannot simply choose between formalism and hermeneutics. Both modes of reading are always available, but each relies on, implicates, and resorts to the other.